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JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,302

HARRY SACHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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261 Filed in Open Court Dec. 21, 1955

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Criminal No. 1261-'55

Grand Jury Original
(2 U.S.C. 192)

(Grand Jury Impanelled on December 1, 1955,
and Sworn in on December 6, 1955)

UNITED STATES OF AMERICA

v.

HARRY SACHER

The Grand Jury charges:

Introduction

On April 19, 1955, in the District of Columbia, a subcommittee of the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, of the Committee on the Judiciary of the United States Senate, was conducting hearings, pursuant to the Legislative Reorganization Act of 1946, Section 102(1) (k), (60 Stat. 818); and to Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress, and to the Standing Rules of the Senate.

Defendant, Harry Sacher, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions.

The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe

the question which was asked of the defendant and which he refused to answer.

COUNT ONE

Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?

COUNT TWO

Have you ever been a member of the Communist Party of the United States?

COUNT THREE

Are you now or have you ever been a member of the lawyers' Section of the Communist Party, U.S.A.?

LEO A. ROVER
United States Attorney in and for the District of Columbia

A TRUE BILL
Foreman

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263 Filed Feb. 9, 1956

Motion to Dismiss Indictment

The defendant moves that the indictment be dismissed for the reason that it does not state facts sufficient to constitute an offense against the United States.

DAVID REIN
David Rein
Attorney for Defendant

264. Filed Feb. 9, 1956

Motion for Bill of Particulars

The defendant moves that the Court order the United States to file a bill of particulars setting forth the following:

1. State the matter under inquiry as to which each of the questions set forth in Counts 1, 2 and 3 are alleged to be pertinent.

2. State the manner in which each of the questions set forth in Counts 1, 2 and 3 are alleged to be pertinent to the matter under inquiry referred to in Item 1 above.

3. State the legislative purpose of the matter under inquiry before the Committee.

DAVID REIN
David Rein
Attorney for Defendant.

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265 Filed Feb. 9, 1956

Motion for a Hearing on the Qualifications of the Grand Jurors

The defendant moves the Court for an order setting a hearing for the purpose of inquiring into the qualifications of the grand jurors in this proceeding.

In support of this action, the defendant states that the list of the grand jurors shows that eleven members of the grand jury which indicted the defendant were employees of the United States Government. Two others are housewives and may be wives of government employees. A hearing would be necessary to determine whether the votes of some of these government employees or wives of government employees were necessary for a return of the indictment.

The hearing on the qualifications of the grand jurors is requested so that the defendant may produce evidence in such hearing that government employees as a class may not properly sit as grand jurors to return the indictment herein because governmental pressures relating to the loyalty and security of government employees prevents such employees from being or appearing to be unbiased in this case.

In addition, the defendant wishes to have an opportunity to examine each of the government employees who sat on the grand jury with respect to the influence upon such juror of the loyalty and security programs of the government in the light of the nature of this case, and to prove, as a result of such questioning, the existence of actual bias on the part of said grand juror against the defendant.

DAVID REIN
David Rein
Attorney for Defendant.

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267 Filed Feb. 9, 1956

Offer of Proof in Connection With Motion for Hearing on Qualifications of Jurors

The defendant, in support of his motion for a hearing on the qualifications of the grand jurors who indicted him, offers to prove at such a hearing that governmental pressures and the climate of opinion among government employees prevented them as a class from being or appearing to be impartial and unbiased grand jurors in the defendant's case. Among the evidence which the defendant will adduce for this purpose are the following:

1. Government employees who have been attacked and accused of alleged disloyalty by congressional figures including Senators McCarthy, Jenner and McCarran and Congressman Velde have been constantly harassed and

subjected to abuse and threats and their positions have been jeopardized. Government employees have been forced to resign because of these charges and one, who had been frequently attacked by both Senator McCarthy and Senator McCarran, was discharged after having twice been cleared by loyalty boards of his agency.

2. In a number of previous cases allegedly involving "security", judges and jurors have been attacked by members of Congress and other government officials whenever such judge or jurors took any action that displeased these congressman. Most notable was the criticism visited upon the judge who presided and the jurors who voted to acquit in the first Hiss trial. Supreme Court Justice William Douglas was threatened with impeachment because of his issuance of a stay in the celebrated Rosenberg case. Appellate judges were criticized on the floor of the Senate and threatened with investigation because of their granting of bail to Harry Bridges. Judge Metzger of Hawaii was denied reappointment as a judge because he fixed bail for a group of defendants at a sum far lower than that recommended by the Department of Justice.

268 3. The situation which was already acute was greatly intensified as a result of the change in administration. President Eisenhower issued a new executive order, 10450, superseding the previous executive order on the loyalty of government employees, Executive Order 9835. The test under this new executive order was stated to be whether any employee of the government was a "security risk". The issuance of the new executive order was accompanied with statements by the Attorney General and other leading officials of the administration that the previous loyalty order had been too lenient and that under the new executive order alleged security risks who had survived the previous loyalty order would be cleared out of the government and that all "doubts" would be resolved in favor of the government. Under the new

executive order, persons were to be retained in the federal service only if their retention "is clearly consistent with the interests of the national security". One of the standards to be considered in making this determination is any "behavior, activities or associations which tend to show that the individual is not reliable or trustworthy."

4. The new executive order was issued with a great deal of attendant publicity. Simultaneously, the administration announced that it was going to cut the federal pay rolls. The simultaneous announcement of a cut in the federal payroll together with the wide-spread criticism of the manner in which the loyalty program had operated under the Democratic administration created a wide-spread and general fear among government employees that their jobs were in jeopardy and that they could be discharged either under the security program or the economy program for the slightest departure from official administration policy.

5. This situation was even further intensified by the public investigation and charges carried on by Senator McCarthy. He criticized not only the general loyalty program under the Democratic administration, but also specific individuals who sat on loyalty boards which
369 had given clearance to government employees. Thus, in McCarthy's eyes the mere fact of having cleared an employee in a loyalty program made the government employees on the loyalty board themselves subject to suspicion of disloyalty. The wide-spread publicity given to these charges of Senator McCarthy made it clear to government employees that supporting, defending or voting in favor of any individual accused of Communism or disloyalty would in itself subject one to charges and suspicions of disloyalty. Government officials attacked by Senator McCarthy on these grounds have been disciplined. Others, although not formally disciplined, have been made subject to investigations, unfavorable publicity, and have had their government careers seriously jeopardized.

6. Not satisfied with the new security program which had already announced that all "doubts" must be resolved in favor of the government, a leading Republican senator called for an expansion of this program to include "crypto-socialists." "Crypto-socialists" were defined as those government employees who believed "government is good and to be expanded", "labor unions are good", and "the federal government, at least since 1932 is progressive", or that "public ownership is better than private enterprise".

7. As a result of such incidents and many others involving the operation of the loyalty and security programs of the government, there exists among government employees and their families, as numerous and competent qualified observers can testify, a climate of fear of being charged with disloyalty or of being a "security risk" on account of opinions, beliefs, associations and actions, which inevitably influences the vote of a government employee serving as a juror in a case such as the defendant's. See, e.g., Barth, The Loyalty of Free Men; Jahoda & Cook, Security Measures and Freedom of Thought, an Exploratory Study of the Impact of Loyalty and Security Programs (1952) 61 Yale Law Journal, 295; Brown, 6,000,000 Second Class Citizens, The Nation, June 28, 1952, Volume 175, p. 644.

270 8. Under the standards and practice of the loyalty and security programs of the government, it would be almost inevitable that loyalty and security boards would take into account how government employees and members of their families sitting as grand jurors in the defendant's case voted.

9. Even if loyalty and security boards did not take such matters into account, government employees and their families believe, and have reason to believe, that loyalty and security boards and loyalty and security investigations

would take into consideration how they voted as grand jurors in the defendant's case.

10. The discipline and environment which condition and surround government employees, the expressed opinions of high government officials, and the policies government employees carry out create in such employees as a class a predisposition which prevents them as a class from being, or appearing to be, impartial grand jurors in a case such as defendant's.

11. The government employees who voted to indict the defendant were because of the pressures and climate and the other factors described, unfair and biased grand jurors in the defendant's case.

DAVID REIN
David Rein
Attorney for Defendant.

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271 Filed Feb. 24, 1956

Order

On this 24th day of Fe ruary, 1956, came the attorney of the United States; the defendant in proper person and by his attorney, David Rein, Esquire; whereupon the motion of the defendant for a hearing on qualification of Grand Jurors, coming on to be heard, after argument by counsel, is by the Court denied without argument; and thereupon the motion of the defendant for a bill of particulars, coming on to be heard, after argument by counsel, is by the Court denied; whereupon the motion of the defendant to dismiss the indictment, coming on to be heard, after argument by counsel, is by the Court denied.

By Direction of
ALEXANDER HOLTZOFF

274 Filed Mar. 15, 1956

Judgment and Commitment

On this 13th day of March, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Hubert Delany and David Rein, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of Violation of Section 192, Title, 2, U. S. Code. as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) months and to pay a fine of One Thousand ($1,000.00) Dollars.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alexander Holtzoff,
United States District Judge.

Excerpts from Transcript of Proceedings

26 **Julian G. Sourwine**

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hitz:

Q. Mr. Sourwine, will you give your full name, please, sir? A. Julian G. Sourwine.

Q. You are an attorney, are you, sir? A. I am.

* * * * * * * * * *

Q. In April, 1955, sir, were you employed by the Judiciary Committee of the Senate? A. I was employed by the Internal Security Subcommittee of the Senate, a subcommittee of the Committee on the Judiciary.

27 Q. How long had you been employed by them, sir? A. I had been employed by the Internal Security Subcommittee since the beginning of 1955 as its chief counsel. I had been employed by the Judiciary Committee in varying capacities for a period of more than ten years.

Q. In April, and particularly on April 19, 1955, did the subcommittee of the Judiciary Committee that you have referred to have before it Harry Sacher as a witness? A. Yes.

* * * * * * * * * *

Q. Would you be good enough to tell us, Mr. Sourwine, the subject that was under inquiry by the Internal Security Subcommittee at the time that Mr. Sacher was called before it as a witness?

* * * * * * * * * *

28 A. The committee was engaged in its continuing investigation into the scope, the extent, and the effect of subversive activity in the United States.

By Mr. Hitz:

Q. And particularly what was the pertinency of the testimony expected to be elicited from Mr. Sacher with respect to that purpose?

. . . . . .

A. The committee hoped to secure testimony from Mr. Sacher with respect to a number of matters

The Court: In respect to what?

The Witness: A number of matters

The committee had testimony in its record dating back from 1952 with respect to activity of Mr. Sacher bearing on the subject of the committee's inquiry, that is, subversive activity.

The committee had information which was not a part of its record concerning other reported activity of Mr. Sacher

The Court: Just a minute.

Do you wish to address the Court?

Mr. Delany: May it please the Court, I would like to move that this answer of the witness be stricken from the record on the ground his testimony is incompetent.

The Court: I am inclined to grant the motion, but I will hear you, Mr. Hitz.

. . . . . .

The Court: Of course, in the Morford case the evidence that was offered was evidence as to just what information was in the files of the committee. It happened to be a speech. But here the witness is testifying to the general conclusion that there was information of a certain kind.

Perhaps my statement that this is hearsay is not quite accurate. It is really a conclusion, for example, if I may take an analogy from another field. In order to establish reasonable ground for making an arrest you can put in hearsay information, but you have to point expressly what

that hearsay was, and not only a statement that information existed.

Mr. Hitz: I quite agree with the Court.

The Court: So I will sustain the objection.

. . . . . .

33 The Court: The Court's ruling applies only to the general statement. I will allow the witness, however, to summarize specifically the information that the committee had on this subject.

Mr. Hitz: Yes, Your Honor.

The Witness: I am not sure that I can state it all.

The committee had received testimony in connection with its investigation of the Institute of Pacific Relations that a certain transcript in a case before the Immigration and Naturalization Service of which the Immigration and Naturalization Service said there was only one copy allowed out; and which copy Immigration and Naturalization Service told the committee had been given to Mr. Sacher.

. . . . . .

34 Q. Will you tell us in what capacity Mr. Sacher was allegedly acting when he received the supposedly sole copy of the report? A. As counsel for Mr.
35 Santos whose immigration case was then before the Immigration and Naturalization Service.

. . . . . .

Q. Will you state only so much of the information
36 Mr. Sourwine with respect to Mr. Sacher's activities in 1952 that your committee knew about as would relate to the purposes of your resolution, and tell us how it does relate to that was now to relate with respect to his obtaining the allegedly single copy of the Government document.

Mr. Delany: May it please the Court, I respectfully object to this question as irrelevant and incompetent.

The Court: Objection overruled.

The Witness: The committee's investigation, sir, had to do with subversive activities, their existence, their scope, and their effect. I do not want to go beyond what the Court has instructed should be the proper limits.

To summarize, Your Honor, the committee had a great deal of information on the general subject of the activities of Communist lawyers in connection with the Communist conspiracy.

The committee had on previous occasions sought to particularize that general information.

I wonder if it would simplify this matter if I said that a summary of all of the non-sworn information which was before the committee had been printed in the committee's report as an appendix and is available, that is, relating particularly to Mr. Sacher.

Mr. Delany: May it please the Court, I want to move to strike out his answer because it is irrelevant, incompetent, and it is not responsive to the question.

37

The Court: I am going to deny the motion, but of course the witness' answer doesn't incorporate by reference that particular record into the record of this trial.

By Mr. Hitz:

Q. Are you able to summarize the information that the committee had at that time? I don't think that will overstep the limitations the Court has put on your testimony, sir. A. The committee had information respecting Mr. Sacher's connections with Communist and Communist front organizations going back over a period of a number of years, going back to at least as early as 1937.

The Court: What was the information? You said you had information with respect to certain matters. What was that information?

The Witness: Well, the committee had information that Mr. Sacher had been connected in one capacity or another with various Communist front organizations over a period of many years.

Mr. Delany: I respectfully ask that Your Honor strike that statement from the record because it is irrelevant and incompetent also.

The Court: Objection overruled.

This testimony is not being accepted and admitted by the Court as proof of any fact except as proving
38 relevancy of the inquiry and not of any activity of this defendant.

Mr. Hitz: Precisely, Your Honor.

The Court: The Court understands that that is the purpose of this testimony.

Mr. Hitz: That is to prove pertinency under the indictment.

Mr. Delany: But even as to that, may it please the Court—

The Court: I am going to proceed. I have over-ruled the objection.

Mr. Delany: Would Your Honor hear me on that? I respectfully request that you hear me.

The Court: Very well.

Mr. Delany: Even as to that it is so general and so vague and it doesn't say anything specifically—

The Court: That might go to the probative value of the testimony, not to its admissibility.

By Mr. Hitz:

Q. Mr. Sourwine, counsel says you are too vague. Will you be specific with respect to Mr. Sacher? Will you tell everything that the committee knew at that time concerning his Communist activities? A. Yes, sir.

Q. Let us go back to the Santos papers. Start right from the beginning.

39 Mr. Delany: For the record, I am going to object to that question.

The Court: Objection overruled.

The Witness: The committee knew with respect to the Santos papers that they were papers which were supposedly

not public; that the Immigration and Naturalization Service said they had been given only one copy outside of its possession; that that copy had been given to Mr. Sacher as counsel for Mr. Santos.

The committee knew that a copy of those proceedings turned up in the possession of Mr. Lattimore who handed it into the record of the Tydings Committee proceedings.

By Mr. Hitz:

Q. In what year, sir? A. It was in '38, I believe. This committee learned of that in 1952.

The Court: This is very cryptic to the Court. What is the name of the proceeding to which the witness referred?

By Mr. Hitz:

Q. Mr. Sourwine, will you tell the Court the name of the proceeding in which Mr. Sacher obtained this sole copy of the Immigration report? A. It was a proceeding relating to the immigration status of one Santos. It was an Immigration Appeals case.

The Court: But that doesn't signify anything to me. The Court: What was the point of this testimony?

It would be helpful if you brought out the nature of the proceeding and what the purpose is in showing that there was information that this defendant handed a copy of the transcript to somebody else. I just don't follow that.

Mr. Hitz: Yes, Your Honor.

By Mr. Hitz:

Q. Mr. Sourwine, was that an immigration case? A. Yes, sir.

Q. Who was the person who allegedly violated the immigration laws, his last name? A. Santos.

Q. Santos? He was represented by whom? A. I understand he was represented by Mr. Sacher. I am testifying to that of my own knowledge.

Mr. Delany: Your Honor, please, I object to the question and the answer, and ask that it be stricken on the ground that it is improper for the District Attorney, the Government attorney, to ask about any case in which Mr Sacher appeared as attorney for Mr. Santos.

The Court: Objection overruled.

By Mr. Hitz:

Q. Was it information in the hands of the committee that Mr. Sacher represented Mr. Santos in that Immigration proceeding? A. Yes, sir.

Q. For what purpose did the committee, for what purpose was this particular document given to Mr. Sacher as attorney for Mr. Santos?

Mr. Delany: I object to this question, Your Honor.

The Court: Objection overruled.

I suggest you reframe it this way. What was the information the committee had with respect to was the Immigration authorities gave Mr. Sacher this particular document? A. Well, I have been the information which was put into the committee record.

Q. I realize that, Mr. Sourwine, but I am trying to get you to relate as a witness -- we don't have to read that. The Court has permitted you to do it. Will you please do it? A. Will you rephrase your question?

Q. I will have to read. A. All right.

The Reporter (Reading):

"Question: What was the information the committee had with respect to what the Immigration authorities gave Mr. Sacher this particular document?"

The Witness: The committee had no information as to what they gave, except that he had requested it.

By Mr. Hitz:

Q. Was it the action of the Immigration & Naturalization Service in the proceeding? A. To my knowledge, sir.

Q. I am sorry. In each of my questions—I will reframe them then, in the information of the committee to your knowledge did the committee have information that the Immigration authorities gave to Mr. Sacher as the attorney for Santos the document in question? A. The committee had such information.

Q. And in the information of the committee, what next happened to the document? A. That is what the committee was attempting to determine, sir.

Q. I see.

The Court. I don't see the relevancy unless you are going to develop between these three questions and a record in an Immigration proceeding—

Mr. Hitz. I am going to develop it, Your Honor.

By Mr. Hitz:

Q. You say the committee didn't know what became of it but wanted to find out? A. Yes, sir.

Q. Did they have any information with respect to what was introduced in the Lattimore Senate investigation with respect to this questioned document? A. The committee had information that there had been introduced before the Tydings Committee by Lattimore a copy of this same transcript.

Q. Yes, sir. So the committee did have that information as to what happened? A. That is true.

Q. Yes, sir.

Q. Mr. Sourwine, you have been testifying concerning the information that the Internal Security Committee had prior to Mr. Sacher being called as a witness concerning Mr. Sacher's activities in connection with subversive activities. Just now you were about to detail what information the committee had with respect to an incident concerning one Santos who Mr. Sacher had at one time represented.

I wonder if you would be good enough to tell us further concerning the information that the committee had with reference to Mr. Sacher's connection with Santos
44 and any subversive activities.

Mr. Delany: May it please the Court, I object to that question on the ground that the committee had nothing to do with any action that Mr. Sacher had while representing a client.

The Court: I am going to overrule the objection. This evidence is being admitted solely for the purpose of determining whether the questions asked by the committee which are referred to in this indictment were or were not relevant to the inquiry.

The answers are not being admitted as proof of any facts therein contained.

Mr. Delany: Except for—

The Court: I have ruled. Just a moment. It is not the practice in this court for counsel to respond to the Court's ruling. I have heard you fully and you made your objection.

The Witness: The importance of this document from the standpoint of the committee, Mr. Hitz, was not that it concerned a Mr. Santos, but it concerned a great deal of matevin derogatory to Louis Budenz and, that it was offered in another proceeding for the purpose of smearing Mr. Budenz and was offered by Mr. Lattimore.

By Mr. Hitz:

Q. For the record, who was Mr. Budenz at that
45 time? A. Mr. Louis Budenz was a former member of the Communist Party who at that time was a witness before the Tydings Committee.

Q. I see. There hearings had taken place prior to 1950, is that correct, sir? A. That is correct, yes, sir.

The Court: What was the Santos case about? Did it have anything to do with the Communist Party, or was it just an ordinary deportation proceeding?

By Mr. Hitz:

Q. Would you enlighten us, Mr. Sourwine, on that? A. It was a deportation appeal, as I understand it, sir, but I am not thoroughly familiar with the Santos proceeding.

The important thing to the Internal Security Subcommittee was that a document supposedly not public turned up in hands in which it was not supposed to be and was offered for a public record for the purpose of smearing a witness against Communism.

The Court: I don't like the use of such words as "smearing." Don't use slang in the court.

The Witness: I apologize to the Court.

The Court: You mean for the purpose of criticizing the witness?

The Witness: Impugning his reputation, sir.

46 The Court: Very well.

The Witness: Attributing to him immoral actions.

The Court: Was there anything in that testimony that imputed the character of this other witness? You see what the Court is trying to ascertain, Mr. Hitz?

Mr. Hitz: May I question him some further on this?

The Court: Yes.

By Mr. Hitz:

Q. Prior to 1952 had the Tydings Committee held hearings? A. Yes, sir.

Q. Concerning the Institute of Pacific Relations? A. No, sir. That wasn't the subject of the Tydings Committee hearings. The Tydings Committee hearings held were on Communism, sir, but other phases of it.

Q. It did not have anything to do with the Institute of Pacific relations? A. Collaterally, yes, sir.

Q. That was my question, sir. A. I am sorry.

Q. Now, Owen Lattimore was one of the subjects of the investigation of the Tydings Committee, is that not right, sir? A. That is correct, sir.

Q. Mr. Budenz was one of the witnesses in that
47 hearing, was he not, sir? A. Yes, sir.

Q. His testimony was largely against that of Mr. Lattimore; correct, sir? A. Yes, sir.

Q. And others like him; correct, sir? A. Yes; sir.

Q. And a document was issued from the Immigration Service in the matter of one Santos to his lawyer, Mr. Sacher; correct, sir? A. Yes, sir.

Q. That information, that document contained discrediting matter concerning a witness who was testifying in a Tydings Committee hearing? A. Yes, sir.

Q. And that found its way in the Tydings Committee? A. That transcript was produced by Mr. Lattimore.

Q. And it was believed by the committee, was it not, that the Immigration Service had given its only public copy of that to Mr. Sacher in the Santos case? A. The Immigration Service said so.

Mr. Delany: That is clearly a question of hearsay.

The Court: I am going to overrule the objection.

I am going to state again that the objection would be well founded and the Court would sustain it if this
48 testimony was given for the purpose of proving the facts contained in the witness' answer. We have to distinguish in our thinking between that and merely proving the relevancy of the questions addressed to the witness which are enumerated in the indictment.

The Court is admitting this testimony merely to show the relevancy of these questions. Now, that relevancy may be established by showing that the committee had certain hearsay information which it wanted to investigate. That is entirely proper, just as I have indicated a little while ago that reasonable ground for issuing a warrant may be established by hearsay information.

Mr. Hitz: Thank you, Your Honor.

By Mr. Hitz:

Q. Now, Mr. Sourwine, you say that the information in the hands of the committee with respect to the use of this

document which was given to Mr. Sacher in his capacity as lawyer for Mr. Santos was that it had been given to him for that use; that it was the only copy, extant at least, for the public; and what other information did you have in that connection, and from whom did you get it? A. The committee had information from Mr. Shaughnessy from the Immigration Service that their records disclosed that only one copy of those deportation hearings was furnished to anyone not an official to the Department of Jus-
49 tice, and that was to Harry Sacher.

Q. Can I interrupt you there? I used the words "only one copy had been issued to the public." That is not a correct statement. "One copy had been given to anyone outside of the Immigration Service," is that not a correct statement? A. That was the statement of Mr. Shaughnessy to the then chairman of the committee; yes, sir.

Q. Was there any restriction, according to the information the committee had, any restriction upon the use that could be made by Mr. Sacher of that document? A. The committee was informed that it had been furnished to Mr. Sacher only in his capacity as counsel for Mr. Santos; and that it was not to be used otherwise.

Q. And then the committee had information that it or another copy turned up in behalf of Mr. Lattimore in the Tydings Hearings? A. In Mr. Lattimore's possession. He gave it to the committee.

Q. Did the committee also have—

The Court: For the purposes of the record, what was the Lattimore investigation? The Court cannot draw upon its memory of reading newspaper accounts.

By Mr. Hitz:

Q. What was the Tydings Committee investigation? A. Well, the Tydings Committee was investigating
50 charges which had been made against Mr. Lattimore that he was the top Soviet agent in the United States.

Q. I see.

And he was then subject of the investigation, perhaps the subject? A. By the Tydings Committee, yes, sir.

Q. That is right.

Did the Internal Security Subcommittee when it called Mr. Sacher have any other information than what you have told us concerning how the Tydings Committee got a hold of a similar copy or the copy of the Santos matter that we have been referring to? A. The Internal Security Subcommittee obtained such information, sir, from a Mr. Fanelli, an attorney who stated that he had secured a copy and had furnished it to Mr. Fortas, Mr. Lattimore's lawyer.

Q. I see.

Mr. Delany: I will object to it on the same ground.

The Court: Your objections go to the entire line of testimony, so that you don't have to repeat it. I am overruling the objection and I am admitting the testimony for the limited purpose that I have already indicated.

Mr. Delany: Thank you very much.

By Mr. Hitz:

51 Q. So that, Mr. Sourwine, do we have information in the hands of your committee to the effect that the Santos document or a copy of that document had come into the hands of Mr. Lattimore in the Tydings hearings? A. Yes, sir.

Q. All right; then it might have come either from Mr. Sacher or from one other, correct, sir? A. Yes, sir.

Q. The other being Mr. Fanelli? A. There was conflicting testimony.

* * * * * * * * * *

52 Q. Mr. Sourwine, we are endeavoring to determine what pertinency the testimony of Mr. Sacher had to the purposes of the committee in April of '55, and you were on Subject 1, which is the investigation conducted by the Tydings Committee which led your com-

mittee to get certain information concerning Mr. Sacher.

Did the committee have any desire to determine whether Mr. Fanelli's version of how Mr. Lattimore got the document in the Santos case, whether that was true, or whether the belief of the committee that it had been given by Mr. Sacher was true?

53 The Witness: The Committee wanted—

The Court: Just suppose you answer yes or no. We can make progress so much faster.

The Witness: Yes, sir.

By Mr. Hitz:

Q. What is the answer? A. Yes, sir.

Q. Yes.

And what did it do then? What did the committee do or desire to do? A. The committee desired to ask Mr. Sacher about that incident.

. . . . . .

54 Q. Before we leave that subject concerning the Tydings investigation, the Santos document, and Mr. Lattimore, did the committee have any other information on that same subject which you know of? A. Not except what I have testified to.

Q. Concerning Mr. Sacher. That's all on that subject? A. Yes, sir.

Q. Did the committee have any information concerning Mr. Sacher's own membership in the Institute of Pacific Relations or any connections other than the possible giving of the document to Lattimore with Mr. Lattimore? A. No, sir.

Q. So have we now exhausted that subject with respect to why Mr. Sacher was called? A. No, sir.

Q. No? That one subject, the Santos subject? A. Oh, yes, on that.

. . . . . .

55 Q. Let us proceed to another subject concerning which the committee had information which led the

committee to call Mr. Sacher. Is there another such subject? A. Yes, sir.

Q. What is the subject? A. There are many such subjects. One is the information which was in the possession of the committee at the time that Mr. Sacher had in 1937 been connected with the International Labor Defense which had been characterized by the then Attorney General Biddle as the legal arm of the Communist Party.

Q. Connected in what way, sir, if you know? A. Mr. Sacher had been active in the affairs of the International Labor Defense.

Q. All right, sir. Is there another subject to the information of the committee which caused it to call Mr. Sacher? A. Yes, sir.

Q. What was the next subject, sir? A. The committee had received testimony in executive session that Mr. Sacher in 1950 had been present at a meeting attended only by high functionaries of the Communist Party.

56 Q. Where? A. In New York City, at the headquarters of the Communist Party.

Q. Who else was present? A. It was a birthday party for Alexander Bittelman. Among those present were perhaps fifty high functionaries of the Communist Party, according to the information received by the committee. The committee did not have a complete list of those present, and that is one of the things we wanted to ask Mr. Sacher about.

Q. Is there another subject that caused Mr. Sacher to be brought before the committee, sir? A. Yes, sir.

Q. Will you tell us what it is? A. Mr. Sacher had been a member of the Executive Board of the New York City Division of the American League for Peace and Democracy in 1939-1940.

Q. And what of that? A. The American League for Peace and Democracy has been cited as a subversive organization by the Attorney General of the United States.

Q. Had it been cited at the time that Mr. Sacher was called as a witness? A. Yes, sir.

Q. Had it been cited at the time that the committee had information that Mr. Sacher was connected with it? A. Yes, sir.

Q. Is there another subject, sir? A. Yes, sir.

Mr. Sacher had spoken at a meeting of the Labor Advisory Committee of the Civil Rights Congress in 1952.

He had spoken at a meeting of the Bronx County Civil Rights Congress.

He had been a participant in the Sixth Anniversary Dinner held on March 26, 1952 at the Central Plaza in New York City by the Civil Rights Congress.

He had other connections with the Civil Rights Congress. That is an organization which had been cited as subversive.

Mr. Sacher had been a member of the Board of Trustees of the Jefferson School of Social Science.

Q. Would you tell us what the significance of that is? A. The Jefferson School of Social Science was a Communist-controlled and -dominated school.

Q. In what city? A. New York City.

Mr. Sacher had been a member of the Lawyers Committee on American Relations with Spain which had been cited as a subversive and Communist organization.

Mr. Sacher had been a signer of a telegram to the House Military Affairs Committee opposing conscription, the telegram being under the auspicies of the Lawyers Committee to keep the United States out of war, a subsidiary of the Emergency Peace Mobilization.

Q. In what year? A. In 1940.

Mr. Sacher had been on or had gotten a public reception of the National Council of Arts, Sciences and Professions in 1951 in New York City. That organization had been cited as subversive.

Q. Any other item of information, Mr. Sourwine? A. Mr. Sacher had been a member of and had been active in the National Lawyers Guild which had been cited as subversive.

Q. Any other subject? A. He had been a guest lecturer at the School for Democracy in 1942. That organization, that school, had been cited as subversive by the House Committee on Un-American Activities.

He had been a speaker on numerous occasions at the Workers School, 1938, February, March. That school had been cited by the House Committee on Un-American Activities as subversive.

He had been a signer of a statement in behalf of Lawyers for Communist Cases which appeared in the
59 Daily Worker, June 9, 1950.

He had defended numerous Communists, Communist leaders at various times.

He had been scheduled to speak at the meeting of the Painters Committee to defend Louis Weinstock and to repeal the Smith Act, Hotel Cornish Arms, New York City, March 1, 1952. He did speak there.

Q. Who was Louis Weinstock? A. Louis Weinstock was a Communist.

Q. In what city? A. New York City.

Q. In what year? A. 1952.

. . . . . .

60 Q. Will you tell us what connection there was between Mr. Sacher and Mr. Weinstock in so far as Mr. Weinstock's Communist activities were concerned to the information of the Committee? A. That is one
61 of the things we wanted to find out sir. We did not have that information. We wanted to ask Mr. Sacher about it.

Q. I see.

Mr. Hitz: In view of that, Your Honor, I feel that the Government should move the Court to strike that part of the recent answers of Mr. Sonywine concerning what he knew; that is, the May Day Parade was Communist dominated in New York City now and has had a counterpart in other countries in the world; that not being part of the

information of the committee, I ask the Court that it be stricken. I think it is not relevant here.

The Court: Motion granted.

By Mr. Hitz:

Q. Let us now go back so that we have only relevant material, Mr. Sourwine, with respect to what the committee's information was with respect to Mr. Weinstock's Communist activities. A. The committee's information was only that he was one of the defendants in the Smith Act trial.

Q. I see.

Q. That a committee had been formed, one of several committees, for the defense of the various defendants. This particular one was called the Painters Committee for the Defense of Louis Weinstock.

62 Q. I see. A. And that Mr. Sacher had spoken at a rally of that committee.

. . . . . .

Q. Another subject, Mr. Sourwine, that the committee had information about? A. Well, the committee had information that Mr. Sacher had spoken at other rallies in connection with the defense of Smith Act victims. For instance, at a rally of the Connecticut Committee to Aid the Victims of the Smith Act in the Siesta Room of the Hotel Guard on May 11, 1952; at a rally at St. Nicholas Arena on September 10, 1951.

The committee had information that Mr. Sacher had served as pallbearer at the funeral of Joseph R. Brodsky, a well known Communist.

I believe that summarizes the information that the committee had, sir.

Q. All right, sir.

Mr. Sourwine, had the Internal Security Subcommittee made any investigation, public or private, public or
63 executive, with respect to the testimony of one Harvey Matusow? A. Yes, sir.

Q. As a witness called by the Government in a number of cases? A. Yes, sir.

Q. Would you be good enough to tell us whether or not the committee had any information concerning Mr. Sacher's connection with Mr. Matusow?

Mr. Delany: I object to that on the ground that it is incompetent.

The Court: Objection overruled. This is being admitted for the limited purpose indicated previously.

The Witness: Yes, sir. The committee had such information. You want the gist of it?

By Mr. Hitz:

Q. I wonder if you would be good enough, having in mind the course of the questioning and the Court's ruling, if you would be good enough to tell us who Matusow was, what the subject matter was on which he testified, the connection that Mr. Sacher was alleged to have with Mr. Matusow and his activities? Can you relate to us those matters? A. Harvey Matusow was a young man who had been a member of the Communist Party, had deflected from the Party, had given testimony against various members of the Communist Party, and had subsequently
64 recanted his testimony and furnished affidavits in two cases for use in connection with requests for new trials for convicted Communists.

Q. Are you able to tell us what those two trials were? A. They were the Elizabeth Gurley Flynn case in New York.

Q. Was that a Smith Act case? A. That was a Smith Act case.

Q. Was Louis Weinstock in that case? A. I understand he was, sir.

Q. And the other case, sir? A. And the other case related to an official of the Mine, Mill and Smelter Workers Union who was tried, I believe, in Texas.

Q. A man named Jencks? A. Clinton Jencks, J-e-n-c-k-s.

Q. What was he charged with, if you remember? By

the way, when I say, "If you remember," so far on this subject have you related information then in the hands of the committee? A. Yes, sir.

Q. Will you tell us if the committee had information as to what Mr. Jencks had been charged with? A. Mr. Jencks had been charged with the improper giving of a non-Communists affidavit.

65 Q. That is lying about it? A. Yes, sir.

Q. And you say that the Committee had information that Mr. Matusow had testified for the Government in both of those cases? A. Yes, sir.

Q. And what happened subsequent to that, sir? A. Subsequent to that time Mr. Matusow had recanted his previous testimony and had given affidavits to be used in seeking new trials for those defendants.

Q. Would you be able to tell us a little bit more of the details concerning his recantation so far as the committee was aware of prior to calling Mr. Sacher? A. Yes, sir. The committee had established prior to that time that the plan for getting an affidavit from Mr. Matusow in the Jencks case had been hatched by two attorneys; that they had—

Q. Will you name them, if you know the names? A. Yes. Nathan Witt was one of them.

Q. Are you still confining yourself to information in the hands of the committee; are you? A. Yes, sir.

As a device to get Mr. Matusow to do this, it was decided to get him to write a book; the money to pay for the book had been provided through the Mine, Mill and Smelter Workers Union. Mr. Matusow had agreed to write the book. The book contained chapters on the two trials that I have mentioned.

The affidavits were prepared and Mr. Matusow was induced to sign the affidavits.

The committee had what it considered evidence indicative of the fact that this whole matter was a conspiracy having as its primary purpose the discrediting of Govern-

ment witnesses, the securing of new trials for convicted Communists, and the hampering of the Department of Justice's activity in securing information about Communism and other subversive activities.

Q. So far what you have told us was information in the possession of the committee? A. Yes, sir.

Q. Can you move on to the information the committee had with respect to Mr. Sacher's activities, if any? A. The only connection that the committee had information of in its files at that time was that Mr. Sacher had received the affidavit and certain other papers from Mr. Matusow.

Q. In which case? A. In the trial of the Elizabeth Gurley Flynn, et al., the trial of the Smith Act defendants in New York, for the purpose of using those papers and that affidavit in seeking new trials in those cases.

67 The Court: Was he counsel in the case?

The Witness: Yes, sir.

By Mr. Hitz:

Q. Any connection that he may have had with respect to the Jencks affidavit? A. The committee had no information that he was in any way connected with the Jencks affidavit.

Q. Any connection that he may have had with respect to the provision for payment of Matusow for writing the book? A. Well, one of the things we wanted to ask him about was that.

Q. That is that Mr. Matusow had been paid something to write a book? A. Yes, sir.

Q. That the committee had information, as you stated, that Mr. Matusow in connection with his repudiation of his testimony in two criminal trials was going to write a book; right, sir? A. Yes, sir.

Q. To get paid for the book? A. Yes, sir.

Q. By whom? A. Well, he was paid for the book by the firm of Cameron and Kahn. The firm was instructed to

initially from the funds of the Mine, Mill and
68 Smelter Workers Union through Nathan Witt.

Q. And Cameron and Kahn? A. Cameron and Kahn are persons who had a venture, a publishing venture. They are persons, both of whom, according to the information of the committee, were members of the Communist Party.

Q. And they were going to publish the book, is that right, sir? A. They did publish it.

Q. They did publish it? A. Yes, sir.

Q. And all this information to the committee, is that right, sir? A. Yes, sir.

* * * * * * * * * * *

69 Q. Mr. Sourwine, I think we had gotten to the point where Cameron and Kahn had a publishing venture, and that they were the ones who were going to pay Mr. Matusow for writing the book; they were going to get the money from the Mine, Mill and Smelter Union. What is that outfit? A. That is the International Union of Mine, Mill and Smelter Workers.

Q. All right, sir.

And that this was in connection with the affidavit that Mr. Matusow would file to repudiate the testimony given in the two criminal cases; and that Mr. Sacher was connected with his venture with respect to the Elizabeth Gurley Flynn case in New York? A. Yes, sir.

Q. In which Mr. Weinstock was one of the defendants; right, sir? A. Yes, sir.

70 Mr. Delany: I object to that, Your Honor.

The Court. On what ground?

Mr. Delany: I object to that. There is no testimony that shows he was so connected.

The Court: As I understand it the witness is testifying that the committee had information to that effect in its files. That is all this answer is being admitted for.

Mr. Delany: I think that Mr. Hitz will admit that so

far there has been no such testimony to show that Mr. Harry Sacher had anything to do with it.

The Court: Of course, this question of counsel is a bit leading, but I think the testimony is being elicited now. Very well.

Mr. Delany: May it please the Court, I think counsel, Mr. Hitz, will admit that there has been no testimony connecting Mr. Sacher with paying for the book or anything else.

The Court: I will overrule the objection.

Mr. Delany: I will except.

The Court: You may proceed.

By Mr. Hitz:

Q. Now, Mr. Sourwine, let us get back a little way so that I don't asume anything that is not in evidence, and I hope I don't ask any leading questions. I am sure it won't
71 be necessary to do so, and I wouldn't do it if it were.

Would you tell us what was the connection that the committee had information about between Mr. Sacher and Mr. Matusow's repudiation of his testimony, the writing of the book, the payment for the book, the publishing of the book? What was the information that you had in the committee with respect to Mr. Sacher's participation? A. The committee had information, sir, that this entire Matusow proceeding, his recantation, the writing of the book, the whole drive to discredit Government witnesses, the coining of the phrase "informer" were all the product of the planning of a group of lawyers within the Communist Party.

Q. I see. A. The committee had information that Mr. Sacher was one of those lawyers, and we wanted to ask him about it.

Mr. Delany: If Your Honor please, I object to that question and ask that it be stricken out.

The Court: Objection overruled.

Mr. Delany: Exception.

By Mr. Hitz:

Q. And that Mr. Sacher was one of those lawyers in that program? A. Yes, sir.

Q. Did your committee have information as to
72 whether or not one Donner, an attorney in New York City was associated with Mr. Sacher? A. The committee did have such information. Mr. Donner was associated with Mr. Sacher in the sense that according to the committee's information he occupied the same offices with him, law offices.

Q. Any associations with respect to this purpose that you have named already for certain lawyers? A. Well, to the extent that Mr. Donner was the author of an article which appeared in the Nation which kicked off this drive against informers.

. . . . . .

Q. You mentioned that the committee had information that money was going to pass from the Mine, Mill and Smelters Workers to the publishers; then to Matusow for the book? A. Had passed, sir.

Q. Had passed? A. Yes, sir.

73 Q. Did the committee have any information with respect to any payment to be made for any affidavits? A. The committee was attempting to determine whether the money which had been paid for the writing of the book was in fact also payment for the affidavit.

Q. Yes, sir.

Did the committee have any information with respect to any connection between Mr. Sacher and the transfer of the funds ultimately to Mr. Matusow? A. No, sir.

Q. Was the committee interested in that, sir? A. No, sir.

Q. Let me have that answer again. A. No, sir.

Q. The committee was not interested in whether or not Mr. Sacher had anything to do with the transfer of the source from Mr. Matusow? A. No. The committee had

satisfactorily traced that money out of the treasury from the Mine, Mill and Smelter Workers to Mr. Matusow's hands through Nathan Witt and Cameron and Kahn. We were interested to know whether Mr. Sacher knew about it, to what extent he participated in the planning for the strategy of it.

Q. Do you want to qualify your answer that the committee was not interested in this participation? A.
74 I said in the payment.

Mr. Delany: That is really a leading question.

The Court: No, that is not a leading question. Objection overruled.

The Witness: Perhaps I was too limited. I meant in the payments. The participation.

By Mr. Hitz.

Q. You mean in the touching of the bills? A. That is right.

Q. Mr. Sourwine, we are not talking about touching money. We are talking about participation. Do you understand my question? A. In the whole scheme?

Q. Yes, sir. A. Yes, sir. The committee was very much interested in Mr. Sacher's participation in it.

. . . . . .

81 Q. Mr. Sourwine, I think that at the conclusion of yesterday's session my questions relating to the interest of the committee in the activities of Mr. Sacher in the Matusow matter, by which I mean the change in testimony of Mr. Matusow before Federal Courts, my questions have not been sufficiently clear fully to bring out all of the testimony at your hands on that subject, and I wonder, Mr. Sourwine, if you could tell us as briefly as possible just what the interest of the committee was at the time it called Mr. Sacher with respect to Mr. Sacher's participation or alleged participation in Mr. Matusow's change of testimony.

. . . . . .

82 The Witness: Mr. Matusow's book was published by Cameron and Kahn, a firm composed of Angus Cameron and Albert E. Kahn.

The committee knew that Mr. Sacher had attended the meeting at Mr. Cameron's house.

The Court: What do you mean by "knew" that "the committee knew"?

The Witness: The committee, sir, had evidence from a source which the committee considered reliable.

The Court: I see.

The Witness: I am sorry. It was not—

The Court: I want to get those things precise.

The Witness: Yes. It was not evidence. That Mr. Sacher had in 1947 attended a meeting at Mr. Cameron's home which was also attended by one Ann Burlak, a known Communist section leader.

By Mr. Hitz:

Q. In what city, sir? A. In Boston, Massachusetts.

That gave a connection between Mr. Sacher and the firm which had published the Matusow book.

83 The committee had a great deal of information and evidence that this whole Matusow matter was part of a conspiracy to impugn the motives and discredit Government witnesses and to hamper the investigation, the continuing investigation of Communism.

The committee had information that a number of persons, including Mr. Sacher, who had been former members of the Lawyers Section of the Communist Party under Abraham Unger, were connected with this case.

The committee had information that there was in existence a lawyers commission or a law commission of the Communist Party, being a group of high functionaries of the party to whom had been delegated the formulation and oversight of legal strategy for the party; and that included in that group were Nathan Witt and Harry Sacher; and that probably one of those two was the head of it.

The committee had information that the affidavit in the case of Elizabeth Gurley Flynn and others which had been given by Mr. Matusow had in fact been notarized by one Robert Zavell Lewis who identified himself as associated with Mr. Sacher in the Flynn case; that the affidavit had in fact been typed by Mr. Lewis' wife at the home of Albert E. Kahn after having been dictated in substantial part by Mary Kaufman, another attorney associated in the Flynn case.

All of these circumstances together made the committee extremely anxious to get Mr. Sacher's testimony as to what he knew about this matter, and also to ascertain what Communist connections Mr. Sacher would say he had, and what he would be able to tell the committee about the part, if any, which the Communist Party took, to his knowledge, in this whole conspiracy.

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. . . . . .

Q. Have you now related, Mr. Sourwine, all that you can recall that was in the possession of the committee at the time Mr. Sacher was called as a witness, relating to the reasons why Mr. Sacher was called? A. I am not sure that I have, but I think I have hit the important things.

. . . . . .

Q. All right, sir.

Now, prior to and at the time that Mr. Sacher was called as a witness on April, 1955 before the subcommittee, had the committee considered any possible legislative action with respect to restrictions upon the appearance before Government agencies, Federal Courts, and Commmittees of Congress of persons who were then members of the Communist Party? Had that subject been under consideration?

85

Mr. Delany: May it please the Court, I object to that question specifically unless it is shown that the committee in scheduling these hearings stated in expressing the scope of the committee that this was one of the objects.

The Court: This doesn't go to admissibility. This might go to probative value.

Objection overruled.

The Witness: The committee had discussed at various time for several years prior to Mr. Sacher's appearance such legislation, or portions of such legislation. The first suggestions of that nature that I remember had come from Senator McCarran in early 1951.

. . . . . .

86 Q. Moving on to a time subsequent to Mr. Sacher's appearance, did this general subject of restrictions upon members of the Communist Party as advocates before Government agencies, Federal Courts and Committees of Congress become formalized into a bill introduced into the Senate of the United States?

Just answer yes or no. A. Yes.

Mr. Delany: I object to the question and ask that the answer be stricken out.

The Court: Objection overruled.

By Mr. Hitz:

Q. That was action taken subsequent to Mr. Sacher's appearance, sir?

The Court: The bill would speak for itself, if you wish to offer the bill.

Mr. Hitz: Would you mark this for identification?

The Deputy Clerk: Government Exhibit No. 10 for identification.

Mr. Hitz: It is Senate Bill 2326, dated June 27, 1955.

(Senate Bill 2326, dated June 27, 1955 was marked as Government Exhibit No. 10 for identification.)

87 By Mr. Hitz:

Q. Is Government for identification Exhibit No. 10 the bill that you have referred to that eventualized after Mr. Sacher's testimony? A. This bill was introduced after Mr. Sacher's testimony. Such a bill was in the course of

drafting at the time he testified. I made reference to it during the hearing.

Q. Did you draft it? A. I assisted in drafting it, sir.

• • • • • • • • • • •

89 Government Exhibit 9, Your Honor, might I read the designation of persons to comprise the subcommittee?

The Court: Very well.

Mr. Hitz (Reading):—

"This is to certify that at the meeting of the Senate Committee on the Judiciary on Monday, February 7, 1955, the following members being present,

Senator Kilgore, Chairman
Senator Eastland
Senator Kefauver
Senator Hennings
Senator Daniel
Senator O'Mahoney
Senator Wiley
Senator Langer
Senator Jenner
Senator Watkins
Senator Butler,

the following members were appointed to the Special Subcommittee on Internal Security:

Senator Eastland (Chairman)
90 Senator Johnston
Senator McClellan
Senator Hennings
Senator Daniel
Senator Jenner
Senator Watkins
Senator Welker
Senator Butler."

• • • • • • • • • • •

93 Q. Mr. Sourwine, would you be good enough to tell us what members of the subcommittee were present at the time that Mr. Sacher testified on April 19th? A. Senator McClellan and Senator Jenner were present throughout the testimony. • • •

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96 **Testimony of Harry Sacher, Attorney, New Rochelle, New York**

Mr. Sourwine. Will you give your name and your present home address, please?

Mr. Sacher. Harry Sacher, 111 Taymill Road, New Rochelle, New York.

Mr. Sourwine. You are a lawyer, are you?

Mr. Sacher. I am.

Mr. Sourwine. And where are your legal offices?

Mr. Sacher. My law offices are at 342 Madison Avenue, New York City.

Mr. Sourwine. Do you practice alone or in partnership?

Mr. Sacher. I practice alone.

Mr. Sourwine. Do you have any associates in your

97 office?

Mr. Sacher. Well, there are lawyers in the suite. They are not my associates in the practice of the law. They occupy space in the same suite where I have my offices.

Mr. Sourwine. Who are those attorneys, sir?

Mr. Sacher. Mr. Frank Donner—

Mr. Sourwine. Pardon my interruption. Do you object to having pictures taken during your testimony?

Mr. Sacher. No, provided they are good looking. I have no objection to them.

Senator McClellan. The Chair would prefer that the pictures, if you want to take them, get them over with right away, because it does interfere with our concentration here. Proceed to make a few and—

Mr. Sacher. Do you want me to continue with the list? I have given you the first.

Mr. Sourwine. Please.

Mr. Sacher. Mr. Frank Donner, Mr. Marshall Perlin, Mr. Arthur Kinoy, Mr. Milton Friedman.

Mr. Sourwine. Are any of those lawyers hired by you, employed by you?

Mr. Sacher. No, they are not.

Mr. Sourwine. In what way, Mr. Sacher, have you been associated with the defense of Communist cases?

98 Mr. Sacher. I do not understand your question.

Mr. Sourwine. Do you know what I mean by Communist cases?

Mr. Sacher. No, sir; I do not know what you mean.

Mr. Sourwine. Have you been associated in the defense of prominent members of the Communist Party, U. S. A.?

Mr. Sacher. Mr. Chairman, may I inquire as to the purpose of this type of inquiry? I have no desire to invoke any privileges of any kind, but it does seem to me that unless these inquiries are related to some legislative purpose, that the inquiry is improper. I am a member of the Bar of the State of New York and of the Supreme Court of the United States in good standing and I defend and prosecute cases which are brought to me and which I choose to defend or prosecute. Now, it seems to me that it can hardly be of national importance whom I defend or whom I represent, and certainly it hardly seems related to a legislative purpose and I would, therefore, object to that question on the ground that it is not a pertinent inquiry in regard to any matters that appear at the moment at least to be within the jurisdiction of the subcommittee or the committee.

Senator McClellan. Restate the question, Mr. Counsel.

99 Mr. Sourwine. In what way have you been associated with the defense of Communist cases?

Senator McClellan. The Chair thinks you can answer that. It would seem that either you have been associated with them or you have not, as counsel.

Mr. Sacher. I do not know what Communist cases are.

Senator McClellan. You have the right, of course, to practice law.

Mr. Sacher. Of course I have and I think I have a right not to be called to account anywhere for the cases that I have participated in, and I think that it is impertinent in the legal sense—of course, I am not speaking in any other sense—in the sense of not being pertinent to any legislative purpose to inquire whom or where I have defended or participated in cases.

Mr. Sourwine. Mr. Sacher, the primary purpose of the question is to identify you—if it is true—as of counsel in certain prominent cases which have involved leaders of the Communist Party.

Mr. Sacher. I object to the question on the ground that no lawyer is identified on the basis of the cases in which he appears professionally. If that is the basis of the inquiry, Mr. Chairman, I respectfully submit it is not relevant or pertinent.

Mr. Sourwine. In what other way does an attorney 100 acquire a reputation?

Mr. Sacher. I do not know what you are talking about, and now you are debating with me, and I submit I do not want to debate with counsel for the committee.

Mr. Sourwine. I will rephrase the question.

Senator McClellan. Let us see if we can work this out, Mr. Counsel. You ask him regarding specific cases in which he may have appeared in court in a particular given case.

Mr. Sourwine. Did you appear in Judge Medina's court in a trial which involved certain leaders of the Communist Party, U. S. A., as counsel for the defense?

Senator McClellan. Now you may answer that.

Mr. Sourwine. That is a matter of record.

Mr. Sacher. Of course, it is a matter of record, and that is an added ground on which I decline to answer, Mr. Chairman.

There is no occasion for the Congress of the United States to call a lawyer before it to inquire in what cases

he has participated, particularly when it is a matter of public record as to what case he participates in.

Senator McClellan. The Chair will order you to answer it. There is no reason why we have to send up there and get the public record and have it certified to
101 when you are available and can testify. Certainly there would be no objection from the standpoint of background. You are not ashamed of it?

Mr. Sacher. Mr. Chairman—

Senator McClellan. There is no reason why you cannot answer the question. The Chair orders you to answer the question.

Mr. Sacher. Mr. Chairman, I am ashamed of nothing I have done, either professionally or in my private life, but that is no reason why I should be brought to Washington to testify about it. Unless it is relevant and pertinent to some legislative purpose, I must respectfully decline, I must respectfully decline to answer the question, and I should like to ask of the Chair what legislative purpose do you state is being served by my answer to this inquiry?

Senator McClellan. Well, the Chair does not necessarily feel called upon to give you all the information that you may desire. This committee is constituted to perform a function for the Congress and for the country, primarily with respect to national security, and the Chair holds that any question which may be asked you regarding anything associated with the subversive elements in this country, if there are such, is a pertinent question, and it is per-
102 tinent to this inquiry. It is the duty of every American citizen to answer such questions when so interrogated under oath before this committee unless he wants to avail himself of the privilege of the Fifth Amendment of the Constitution. So the Chair will direct you to answer the question.

Mr. Sacher. Mr. Chairman, permit me to say this: That I think that an inquiry to any member of the bar concerning cases in which he has participated carries with it implicitly the notion that attorneys are accountable to the

legislative branch of the Government for the cases they handle, and I respectfully submit, Mr. Chairman, that if I decline to answer, you will realize that I decline not out of any disrespect to this committee or any wish to subvert its process, because a declination on my part will not subvert anything that this committee aims to do because, as both of us have observed, my participation in the cases, or at least the case that is being spoken of, is a matter of public record. But I do feel, and I appeal to you as a lawyer, Mr. Chairman, to give thought to the proposition that this may create a bad precedent from the point of view of the freedom of advocacy in our country. In other words, I submit to you, Mr. Chairman, that I think you should take under advisement the wisdom of calling a lawyer before you to state whether or not he has participated in certain
103 cases. I do not think it is wise to do it. I do not think it is in consonance with our notions of an independent bar, and I respectfully submit that a lawyer ought to be as immune from accountability for the cases in which he participates as a Member of Congress is for his utterances on the floor of the House, either of the Senate or of the House of Representatives.

Senator McClellan. The question that has been propounded to you is a preliminary question as a matter of background leading into further inquiry. The Chair has already stated his position. The Chair orders you to answer the question.

Mr. Sacher. All right. I will answer the question and state that I did participate in the case in question.

Senator McClellan. All right, proceed, Mr. Counsel.

Mr. Sourwine. Mr. Sacher, do you know Harvey Matusow?

Mr. Sacher. I know him in the sense that I met him for the first time in my life two days before he took the stand as a witness in support of a motion for a new trial which I was to try in the case of United States against Flynn, and others, before Judge Dimock in the United States District Court for the Southern District of New York.

Mr. Sourwine. What contact have you had with him?

104 Mr. Sacher. My contacts consisted, as I recall it, of the following: I think that I first met him on February 8, 1955. I believe that is the day. I think I saw him on the 8th of February and on the 9th of February, and then I saw him on succeeding days during which the hearing was being conducted before Judge Dimock, my recollection being that the first date of open court hearing on the motion I am speaking of was February 10, 1955.

Mr. Sourwine. Did you ever give him any documents?

Mr. Sacher. Did I ever give him documents?

Mr. Sourwine. Yes.

Mr. Sacher. No; I did not.

Mr. Sourwine. Did you ever give him any papers or other material?

Mr. Sacher. No. Not a thing.

Mr. Sourwine. Did he ever give you any documents?

Mr. Sacher. He did.

Mr. Sourwine. What documents did he give you?

Mr. Sacher. He gave me a 75 page report, that is a copy of a 75 page report, that he had given to various agencies of Government, including the Federal Bureau of Investigation and the House Committee on Un-American Activities in the fall of 1951 or the winter of 1951. The report I refer to bore the date of October 19, I

105 believe, 1951. It was offered in evidence, the report I speak of was offered in evidence by me as 'Defendant's Exhibit B' before Judge Dimock.

Mr. Sourwine. Mr. Chairman, I may say this document is in our record. Proceed.

Mr. Sacher. May I interrupt myself?

Senator McClellan. Has it been made a part of the hearing?

Mr. Sourwine. It has been.

Mr. Sacher. May I interrupt myself at this point, Mr. Chairman, to say the following: That it occurs to me again

that this is an impropriety, how gross I do not intend to say, but I submit there is an impropriety in calling me, calling counsel in the case which Mr. Sourwine mentions which is pending, undetermined, under Judge Dimock at the present time, to testify concerning that case here. Now it seems to me that if there is any matter in connection with the prosecution of that motion which is deserving of scrutiny, that it ought to be submitted to Judge Dimock in the first instance. This seems to me like a flagrant disregard of the separation of powers. After all, this motion for a new trial is of primary concern to Judge Dimock. He now has that under consideration before him. He has my briefs and the United States Attorneys' briefs.

106 Senator McClellan. The Chair may say to the witness we are not going into that case as such, of course. The primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow, whom this committee is investigating as to the questions relating to that, not necessarily to a case in which you are appearing as counsel.

Mr. Sacher. Mr. Chairman, my sole relationship with Matusow is limited to the case in question, United States against Flynn, et al., and I submit that anything else you may ask me about I would not know anything about.

Senator McClellan. That is your statement.

Mr. Sacher. And I am making it under oath.

Senator McClellan. That is your statement and you are making it under oath but you are subject to cross-examination on it, and that is what the committee is proceeding to do. Proceed, Mr. Counsel.

Mr. Sacher. Well, then, I submit, Mr. Chairman, that I think a foundation should be laid, if I may be so bold as to use a bit of legal terminology here, a foundation ought to be laid here for the propriety of the inquiry that is being made.

Senator McClellan. The foundation has already been laid in previous hearings for the testimony that we are

seeking to adduce this morning, and if you will be a
107 little more cooperative, we can get this disposed of
pretty soon. The question, as I told you a moment
ago, was primarily for background information and you
are going to be asked now some specific questions.

Mr. Sacher. Mr. Chairman, may I say this—I do not think that you intended to imply that I was uncooperative but have no desire to do anything but [illegible] is to answer what I honestly believe is properly asked of me, and second, to see to it that so far as I am concerned, that nothing of the rights, privileges or obligations of attorneys and counselors-at-law are violated in the hearing.

Now, certainly you cannot regard that as [illegible]

Senator McClellan. We will try to not violate that. You have not been asked any questions regarding your [illegible] except that which is a matter of record, public record.

Mr. Sacher. No, he is asking me about things which are not of public record.

Senator McClellan. He is asking you about associations and contacts with Mr. Matusow. You can [illegible] Counsel. I think it is quite proper.

Mr. Sourwine. Mr. Sacher, I must suggest that the suggestion that the proceedings here would prejudice the case in Judge Dimock's court constitute an unjustified reflection upon—

Mr. Sacher. Now, that is not true. [illegible] anything about the proceedings here. [illegible] Dimock—judgment. I think that Judge [illegible] enough not to be troubled by what [illegible] was not the basis of my objection at all.

Senator McClellan. We are not [illegible]

Mr. Sacher. All right, but I do not [illegible] that I suggested here in any way that the [illegible] for Judge Dimock would be prejudiced [illegible] thing that was interrogated about here.

Senator McClellan. [illegible]

you say that was not the intention, you did not intend to imply that, we would proceed with that understanding.

Mr. Sourwine. Mr. Sacher, the question is with regard to documents which you gave Matusow or he gave you. You said you had given him none, that he had given you some and you named one.

Mr. Sacher. That is right.

Mr. Sourwine. Did he give you any others?

Mr. Sacher. Yes, he did.

Mr. Sourwine. Will you tell us about them?

Mr. Sacher. He gave me, in addition to this Defendant's Exhibit B, some sheets of paper which bore
109 the names of a number of people. I do not know the exact number. But these sheets of paper were part of, maybe 28 sheets which he turned into the FBI, and which I think were received in evidence before Judge Dimock as Defendant's Exhibit M.

Mr. Sourwine. These documents, Mr. Chairman, will be offered for our record at a later time.

Go ahead. Any others?

Mr. Sacher. In addition, he also gave me a diary, that is, these were loose sheets, the first sheet of which was dated, I believe, sometime in 1948, and my present recollection is that the next sheet in this group of sheets was dated sometime in 1950, and then there was a group of sheets running fairly consecutive from, I believe it was sometime in December, 1951, to the end of April, 1952.

Now, that is this diary that I am speaking of, and portions of it were introduced into evidence before Judge Dimock as Defendant's Exhibit A-1 to, I believe, something like 3, 4, or 5. I do not recall.

Mr. Sourwine. This document, Mr. Chairman, will be identified by Mr. Matusow for our record when he appears before us.

Any others, sir?

110 Mr. Sacher. Well, there were other pieces of paper that he gave me. There were, what he called Q and

A sheets used in the preparation of his testimony before the SACB in one or more cases that he was a witness in before that body, and my recollection is that those sheets were offered in evidence but not received. They were marked for identification. My recollection is those were defendant's Exhibits E, F, and G, for identification.

Mr. Sourwine. Any others?

Mr. Sacher. In addition there was a list of books or pamphlets which I think was Exhibit H, defendant's Exhibit H either for identification or in evidence, which he had, he said, furnished to the United States Attorney in the course of his preparation as a witness in the Flynn case. Now there may have been other pieces of paper which, at the moment, I do not recall.

Mr. Sourwine. That is all you remember?

Mr. Sacher. But I think those are the main papers in any event.

Mr. Sourwine. Those are all you know of now, all that you now recall?

Mr. Sacher. Those are all I presently recall.

Mr. Sourwine. Did Mr. Matusow give you an affidavit made by him?

Mr. Sacher. Not me. Not me.

111 Mr. Sourwine. Do you know to whom he gave that affidavit?

... Sacher. I do not. I was here in Washington at the time that affidavit was executed and delivered, and I do not know of my own knowledge, nor do I even know by hearsay, as to whom precisely he delivered it to.

Mr. Sourwine. Now, by that affidavit, do you mean an affidavit which he gave recanting certain testimony he had given in the Flynn case?

Mr. Sacher. That is what I understood you to refer to.

Mr. Sourwine. Did you ever at any time discuss with Mr. Witt the matters of that affidavit?

Mr. Sacher. I did not.

Mr. Sourwine. At no time?

Mr. Sacher. No, sir, not prior to its execution. I may have spoken to him subsequently in the course of the hearing of the motion because he was interested in the hearing before Judge Dimock as counsel for Jencks, and he was in court and I may have had conversations with him about it.

Mr. Sourwine. Did you have anything to do with the phrasing or writing of the affidavit, Mr. Sacher?

Mr. Sacher. Nothing. I had nothing to do with it.

Mr. Sourwine. Did you have anything to do with
112 the procuring of the affidavit?

Mr. Sacher. I had not a thing to do with it.

Mr. Sourwine. Do you know with whom, among defense counsel, that matter was discussed on behalf of Mr. Matusow or by Mr. Matusow?

Mr. Sacher. I do not. I should say by way of explanation that I was engaged in a trial right here in the District of Columbia before Judge Schweinhaut from January 10 to February 3, inclusive, and only got to my home on weekends and so that I had my hands full here in the District and other people took care of what had to be done in New York.

Mr. Sourwine. Mr. Sacher, have you defended Gus Hall, a Communist leader and bail jumper?

Mr. Sacher. I defended Gus Hall.

Mr. Sourwine. Mr. Sacher, have you ever served a prison sentence?

Mr. Sacher. Mr. Chairman, is that question related to some legislative purpose? I wonder.

Senator McClellan. The chair will hear counsel. I was not just certain what the purpose of it was.

Mr. Sourwine. Mr. Chairman, among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal Courts.
113 Among the suggestions for inclusion in such legislation is one which would prohibit members of the Communist Party from practicing in Federal Courts. It is

germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists and by persons who are defending Communists. I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.

Mr. Sacher. I would like to be heard, Mr. Chairman, if I may.

Senator McClellan. The Chair thinks that you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth.

Mr. Sacher. Mr. Chairman, may I be heard, please?

Senator McClellan. Briefly.

Mr. Sacher. Mr. Chairman, my understanding, when I came here was, as given to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation. I believe, and I say this with as much of a sense of responsibility as thirty years of practice at the bar have given me, that I have
114 established rather conclusively by evidence other than Matusow's own recantation before Judge Dimock, that he lied and lied outrageously at the Flynn trial, and I should like the opportunity before I leave the stand today to file with your committee, Mr. Chairman, copies of the briefs that I filed with Judge Dimock and copies of some 13 exhibits that I prepared to demonstrate the falsity of Matusow's testimony at the Flynn trial.

The suggestion that my political beliefs or associations are to be inquired into seems to me to be diversionary in character. I maintain that Matusow lied and that, if this committee wants to know how our judicial procedures may be improved, let them wait until Judge Dimock passes judgment on everything that transpired before him. Let there not be made here an attempt to prejudice the determination not only by Judge Dimock, but by the people of the

United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

Senator McClellan. That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Mr. Sourwine. Are you, Mr. Sacher, a member of
115 the Communist Party, U. S. A.?

Mr. Sacher. Mr. Chairman, I have been called here because of my representation of the defendant in the United States against Flynn on a motion for a new trial on the ground that Harvey Matusow committed perjury in that trial. I have answered and am prepared to answer all questions concerning my participation in that case. I refuse. I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the Fifth Amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me. And I therefore decline on the ground that I cannot with any regard for my own self respect, do otherwise, Mr. Chairman.

Senator McClellan. Well, the Chair does not think that it is beneath the dignity of a good citizen of the United States to answer a question as to whether he is a member of an organization that seeks the overthrow of this Government by force and violence and therefore, the
116 Chair propounds to you now the question, Are you now a member of the Communist Party of the United States?

Mr. Sacher. Mr. Chairman, medieval inquisitors also thought there was no impropriety in asking those whom they regarded as heretics to answer the question.

Senator McClellan. The Chair does not care for a lecture. The Chair asked you a question.

Mr. Sacher. And I decline to answer that question, Mr. Chairman.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I decline to answer that question on the grounds I have already stated.

Senator McClellan. The Chair asks you another question. Have you ever been a member of the Communist Party of the United States?

Mr. Sacher. I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I respectfully decline to answer it.

Senator McClellan. The Chair asks you another
117 question. Have you ever been a member of any organization, Communist Party or by any other name, that advocates and seeks the overthrow of the Government of the United States by force and violence?

Mr. Sacher. I will say to the Chair that I have never been a member of any organization which I believed to be a teacher or advocate of the forceable or violent overthrow of the Government of the United States.

Senator McClellan. All right. You may proceed.

Mr. Sourwine. Have you ever served a prison sentence?

Mr. Sacher. I have, sir. I am sure that that will be most illuminating for the legislative purposes that the committee has in mind.

Mr. Sourwine. What was that sentence for?

Mr. Sacher. I was sentenced for contempt of court.

Mr. Sourwine. Have you ever been disbarred?

Mr. Sacher. No, sir.

Mr. Sourwine. Have you ever been ordered disbarred?

Mr. Sacher. An order was made but was reversed by the Supreme Court of the United States. You see, Mr. Chairman, counsel is not interested in eliciting the truth. He is interested in smearing me, and so although he knows that the Supreme Court of the United States reversed my disbarment, he asks me only whether I was disbarred,
118 and I respectfully submit it is unworthy of the great function of a Senate investigating committee to do that.

Senator McClellan. The Chair thinks you have a perfect right to make that explanation.

Mr. Sacher. I beg your pardon?

Senator McClellan. The Chair thinks you have a perfect right to make that explanation, sir.

Mr. Sacher. Thank you, Mr. Chairman. Thank you.

Senator McClellan. Proceed.

Mr. Sourwine. Did you, Mr. Sacher, ever attend a gathering of leaders of the Communist Party, U. S. A.?

Mr. Sacher. Well, I defended leaders of the Communist Party of the United States of America in United States against Dennis, and I imagine I must have attended such meetings, certainly. That is what you do when you defend clients, Mr. Counsel. You meet with them occasionally.

Mr. Sourwine. Did you ever attend a gathering of leaders of the Communist Party who were not your clients?

Mr. Sacher. I am not aware of it.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman in January, 1950?

Mr. Sacher. I do not remember.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman in January, 1950, in the Board Room
119 at the Communist headquarters on the ninth floor in New York?

Mr. Sacher. I don't remember. I should say to you, Mr. Counsel, that you are speaking of a period when the Dennis case was in full progress, and I cannot say whether I was

in a building where a birthday party may or may not have been taking place at the time.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman at which Henry Winston proposed a toast, 'Comrades, let's drink a toast to Alex'?

Mr. Sacher. I have no recollection of that.

Mr. Sourwine. Do you have any connection with the legal commission or law commission of the Communist Party?

Mr. Sacher. I do not know of any such organization so I cannot say anything about it.

Mr. Sourwine. Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U. S. A.?

Mr. Sacher. Mr. Chairman, I have declined before and I decline again—

Senator McClellan. You are ordered to answer the question.

Mr. Sacher. On the grounds that I have already stated so I need not take the time of the committee, and
120 I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

Senator McClellan. May I say to you that I have great respect for the law profession. I have tried to practice a little law myself. But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and also the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it.

Mr. Sacher. Mr. Chairman, I respectfully say to you that, without any desire to be immodest, I think that in the defense of those that have been charged under the Smith Act or under the Internal Security Act of 1950, I have acted in the best traditions of the profession by defending
121 the rights of people to speak, to publish, to meet under the First Amendment.

Senator McClellan. This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party.

Mr. Sacher. Mr. Chairman, for thirty years I have practiced law in the State of New York and elsewhere in the United States, and I think again, without being subject to the charge of being immodest, that I have done a yeoman's share of the work that had to be done on behalf of the working men and women of our country. And I feel that my life is a living testimonial to what I am and to what I have done for my country, and I respectfully submit it is a late time of the day for me to have to appear before anybody, after thirty years of honorable practice, to testify to my loyalty to the democratic institutions of the United States, and I unswervingly and unhesitatingly tell you my devotion is to the best interests of my country. And I believe that I am serving those interests when I refuse to bend the knee to an inquiry concerning my innermost thoughts and beliefs, whether they be on politics, religion or anything else. My conscience dictates to me that
122 I shall not, under compulsion, answer today any more than John Freeborn Lilliburne answered in the 1640's to the Court of Star Chamber on the same grounds, Mr. Chairman, on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs, I must respectfully decline to answer that question.

Senator McClellan. You have a right to decline, of course, if you wish to invoke your constitutional privilege.

Mr. Sacher. I am invoking my rights as a man and my dignity as a man and I am not invoking any privileges against self incrimination. I have never done anything and I pledge you, Mr. Chairman, I shall never do anything which, so far as I can help, will expose me to any criminal charges.

And I say to you that I speak, not from fear of incrimination or prosecution. I speak only from the dictates of conscience. And I ask all Americans to join me in resisting inquiries of this kind, for when the day comes when Americans will resist inquiries of this kind, we shall once again witness a restoration of those liberties which we so long enjoyed prior to the advent of the suppression of them.

Senator McClellan. Now you have made your
123 speech. You are ordered to answer the question.

Mr. Sacher. I respectfully decline, Mr. Chairman.

Senator McClellan. All right, proceed, Mr. Counsel.

Mr. Sourwine. Mr. Chairman, may I ask that the witness be ordered to answer that question?

Senator McClellan. I ordered the witness to answer the question. He declined. The record so shows. Proceed.

Mr. Sourwine. Did you ever attend a Communist meeting at the home of Angus Cameron?

Mr. Sacher. I don't think I have ever been at the home of Angus Cameron, that is, at least I have no recollection of having been at his home.

Mr. Sourwine. Did you, on November 22, 1947, attend a Communist meeting at the home of Angus Cameron at which time there was present besides yourself, one Ann Burlak, B-u-r-l-a-k, a district organizer for the Communist Party?

Mr. Sacher. I do not think I know who Ann Burlak is. I really don't.

Mr. Sourwine. Now, answer the question, please.

Mr. Sacher. I can't. I don't know who you are talking about. How can I answer it?

Mr. Sourwine. Did you on November 22, 1947, attend a Communist meeting at the home of Angus Cameron?

Mr. Sacher. I do not know. I certainly did not
124 attend any Communist meeting, but I do not know whether I was ever at Mr. Cameron's home. Where was that?

Mr. Sourwine. In Boston, sir.

Mr. Sacher. I have a recollection of being at Mr. Cameron's home once, I think in Boston.

Mr. Sourwine. Was that on or about November 22, 1947?

Mr. Sacher. I have no recollection, not only of the month or the day, but even the year. I have no recollection.

Mr. Sourwine. Do you say categorically that you have never attended a Communist meeting at Mr. Cameron's home?

Mr. Sacher. I was at Mr. Cameron's home. I don't know what meeting took place there, whether it was Communist or not.

. . . . . .

125 Mr. Hitz: That is about right. We can shorten that up, Your Honor, too.

For the record, may the reporter conclude where a little above the middle it is stated "Senator McClellan. You are excused, Mr. Sacher."

Would you terminate your quotation on 844 with that, please?

126 "Mr. Sacher. Mr. Chairman, may I ask you to be good enough to receive in evidence copies of the brief which I filed with Judge Dimock and copies of exhibits which I submitted with the brief to demonstrate that Matusow testified falsely in the Flynn trial?

Senator McClellan. You may submit your documents. They will be referred to the committee for inspection and for such proper use of them as the committee thinks is advisable.

Mr. Sacher. Thank you. May I hand them to you, Mr. Chairman?

Senator McClellan. You may; yes, sir. Lay them right down on the table. We will get them, all right. All right. Are there any other questions, Mr. Sourwine?

Mr. Sourwine. I have no more questions of this witness.

Senator McClellan. You are excused, Mr. Sacher."

By Mr. Hitz:

Q. Mr. Sourwine was Mr. Sacher asked a question in the following language:

"Question. Are you, Mr. Sacher, a member of the Communist Party, U. S. A.," on this occasion?

Mr. Delany: May it please the Court, the record is all in there. It seems to me there is no need to repeat that here.

127 The Court: I think in a sense this is cumulative, but this being the very vitals of the case, if the Government wants to put on cumulative testimony I am going to let the Government do it.

Mr. Hitz: Thank you, Your Honor.

The Witness: He was asked that question.

By Mr. Hitz:

Q. Also, "Have you ever been a member of the Communist Party of the United States?" A. He was asked that question.

Mr. Delany: I assume, Your Honor will grant me an objection to all of this cumulative testimony?

The Court: Oh, yes.

By Mr. Hitz:

Q. And, "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U. S. A.?" A. He was asked that question.

Q. Did he answer those questions?

Mr. Delany: I object, Your Honor.

The Court: Objection overruled.

By Mr. Hitz:

Q. Did he, sir?

The Court: He may answer.

The Witness: He declined to answer, sir.

By Mr. Hitz:

128 Q. Did he raise the question of the Fifth Amendment as a reason for refusing to answer any one of those questions, sir?

Mr. Delany: I object, Your Honor, again because the record speaks for itself.

The Court: Yes. I understand. This is cumulative, but I am going to allow it.

The Witness: He did not claim any Fifth Amendment privilege. On the contrary, he disavowed any intention to claim the Fifth Amendment.

Mr. Delany: The Court understands that my objection is not only to this question that it is cumulative, but the witness may be mistaken.

The Court: He may be.

Mr. Delany: The record speaks for itself.

The Court: Now just a moment. All witnesses may be mistaken. That doesn't make their testimony inadmissible. It is entirely competent for a witness who heard testimony given to state his recollection as to what the testimony was, not as proof of the fact contained in the testimony, but as proof of the fact that the testimony was given or refused, if that is the issue in the case.

Mr. Hitz: I am going to offer now Government's Exhibit No. 10 for identification, which is the Senate Roll which has been referred to this morning.

129 Mr. Delany: I object to this, Your Honor, it is irrelevant.

The Court: Let me see the exhibit.

(Government's Exhibit No. 10 for identification was handed to the Court.)

The Court: Had you completed your statement?

Mr. Delany: Yes, it is irrelevant.

The Court: The objection is overruled. The bill is admitted on the issue of pertinency of the questions addressed to the witness, that is, addressed to the defendant as a witness. It tends to show that the testimony or the questions related not only to the subject matter that was within the legislative jurisdiction of the Congress, but also to a subject matter that was in regard to which legislation was then being actively considered. It may be admitted.

(The document heretofore marked for identification was received in evidence as Government Exhibit No. 10.)

Q. Mr. Sourwine, do you have a copy of

The Court: The date is April 6, 1956, but the Court will take notice of that.

Mr. Hitz: Yes.

I still want to ask [illegible]

BY MR. HITZ:

Q. Do you have a copy of [illegible]?

A. Yes.

Q. It is dated April 6, 1956, [illegible] appears on the front page?

A. Yes, sir.

Q. Would you be good enough to tell us whether or not [illegible] that date?

A. That is the date of the cover letter with which the report was first sent to the printer for galleys.

Q. And subsequently [illegible]?

A. Yes.

Q. I would ask you now, [illegible]

folio 73 to 238 went to the printer. That second batch contained the first draft of the discussion of Mr. Sacher's participation in the case.

On May 17, 1955 a first draft of conclusions and recommendations was sent to the printer.

Q. A little more slowly, sir. A. After that time there were a number of galley revisions on individual galleys.

1:38 On July 14, 1955 the galleys were returned to the printer for page proof after a majority of the subcommittee approved the report.

The final page proof was returned to the printer with the last corrections on December 23, 1955, and subsequent to that the report was issued.

Q. In what month was it ultimately released for publication? A. In January, 1956.

Q. Does it have in the material the testimony of Mr. Sacher on April 19, 1955? A. It does. As a matter of fact this report quotes from the page and refers to the page of the printed record of Mr. Sacher's testimony.

. . . . . .

Mr. Hitz: And again with particular reference to the mention of the name of Harry Sacher in the middle part of the paragraph immediately above the middle of page 59.

The next passage is on page 86, a portion of the report entitled "Harry Sacher Defies the Subcommittee," and the conclusion of that portion on page 87.

The Court: Now, I am wondering if that is admissible. This is a comment on the charge which is before the Court in this case, the committee's comment on that charge. I have some question in my mind whether that would be admissible.

Mr. Hitz: May I be heard on that?

The Court: Yes.

Mr. Hitz: The resolution that creates these powers [illegible]

the duty upon that committee or a subcommittee of it to investigate and report on the certain designated subject.

This report and this immediate passage that we are referring to here is offered for the purpose of showing that this subcommittee in fact did use the testimony of Mr. Sacher in its report under the resolution which indicates a legislative purpose in the committee in obtaining the testimony and later in the use by way of reporting it to the Congress.

141 The fact that it should contain comments and conclusions I don't think makes it inadmissible for the purpose of showing that there was embodied in a report in which there were recommendations for legislation the background for the recommendations.

The Court. The Court will admit it merely for the purpose of showing that the testimony of Sacher was used by the committee in connection with its legislative work.

Mr. Hitz. Precisely.

The Court. But will for the purpose of this case not consider the comments contained in that passage.

Mr. Hitz. Yes, Your Honor. That is the purpose of it, and we are happy to adhere to that restriction.

143 Mr. Hitz. And of course if a [illegible] committee [illegible] consideration. I would like to refer next and particularly to Plaintiff's Exhibit [illegible] which we have marked as the [illegible] exercise in the same fashion under the pertinent and the legislative purpose of [illegible].

I hasten to [illegible] recommendation [illegible] three [illegible] context [illegible] to raise [illegible].

The [illegible] not a [illegible].

Mr. [illegible]

Hous[illegible]

The Court: You want that in there?

Mr. Delany: I do.

The Court: Surely, you may have it. I thought I was protecting the defendant's rights by excluding it.

• • • • • • • • • •

153 Cross-Examination

By Mr. Delany:

154 Q. Mr. Sourwine, when did the subcommittee hold hearings on the Institute of Public Relations, what year was that? A. The hearings on the Institute of Pacific Relations were held in 1951 and '52.

Q. Did you call Mr. Fanelli as a witness to testify about the documents that you say were given by the department of Immigration and were released by Mr. Fanelli? A. Yes, sir. I stated that earlier. We called him on April 12th.

The Court: I think we can shorten this if you will just answer yes without elaborating, if yes is a proper answer.

The Witness: Yes, Your Honor.

By Mr. Delany:

Q. Did you at that time—

The Court: We are trying to save your time.

By Mr. Delany:

Q. Did you at that time call Mr. Sacher as a witness? A. No.

Q. To testify at this inquiry? A. No.

• • • • • • • • • •

213 **Ruling by the Court**

The Court (Holtzoff, J.): This is a trial by the Court without a jury of an indictment charging the defendant Harry Sacher with the offense generally known as contempt of Congress, namely, that he willfully refused to answer certain questions addressed to him as a witness by a subcommittee of the Committee on the Judiciary of the United

States Senate, the function of the subcommittee being to investigate the administration of the Internal Security Act, and other Internal Security Laws, as well as subversive activities.

The indictment charges that the defendant refused to answer questions addressed to him as a witness at a hearing of this subcommittee on April 19, 1955. The questions are as follows:

"Are you, Mr. Sacher, a member of the Communist Party, U. S. A.?

"Have you ever been a member of the Communist Party of the United States?

"Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U. S. A.?"

The Committee on the Judiciary of the United States Senate is one of its permanent standing committees, and is established by statute as well as by the standing rules of the Senate. By a resolution of the Senate adopted on December 21, 1950, known as Senate Resolution 366, the

214 Committee on the Judiciary or any duly authorized subcommittee thereof was authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence. By a resolution adopted on March 18, 1955, known as Senate Resolution 58, the creation of this authority of the Committee on the Judiciary was reaffirmed and imple-

mented by powers conferred on the committee to make certain expenditures and employ certain assistants and consultants.

On January 20, 1955, by a resolution of the Committee on the Judiciary a special subcommittee to make investigations under Senate Resolution 366 was continued during the 84th Congress, which is the Congress referred to in this indictment. On February 7, 1955, at a meeting of the Senate Committee on the Judiciary a certain number of members of the committee were appointed to this
215 special subcommittee. Among them were Senators McClellan and Jenner. On the same day at a meeting of the subcommittee a resolution was adopted providing that a quorum of the subcommittee for the purpose of taking sworn testimony should consist of not less than two Senators of said subcommittee. Authority to fix the quorum had been previously granted by resolution of the full committee.

The proof shows that on April 19, 1955 at a hearing conducted by the subcommittee at which a quorum was present throughout, consisting of Senator McClellan and Senator Jenner, the defendant was called and sworn as a witness. He was asked a number of questions, among them the three questions involved in this case.

As to these questions the transcript of the hearing shows that the following proceedings took place.

He was questioned by Mr. Sourwine, the general counsel of the committee:

"Are you, Mr. Sacher, a member of the Communist Party, U. S. A.?"

The defendant declined to answer, giving a rather long explanation for his action, the pertinent parts of the explanation being as follows:

"I refuse. I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic or social. I do not do so on the ground of the Fifth Amend-

216 ment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me. And I therefore decline on the ground that I cannot with any regard for my own self respect, do otherwise, Mr. Chairman."

Senator McClellan, who was presiding, then repeated the question:

"Are you now a member of the Communist Party of the United States?"

The defendant responded:

"And I decline to answer that question, Mr. Chairman.

"Senator McClellan. The Chair orders you to answer the question."

The defendant again said:

"I decline to answer that question on the grounds I have already stated."

Then the Chairman asked the defendant the second question involved in this case:

"Have you ever been a member of the Communist
217 Party of the United States?"

The defendant's reply was:

"I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economical or social, past or present, and I decline to answer your question.

"Senator McClellan. The Chair orders you to answer the question.

"Mr. Sacher. I respectfully decline to answer it."

Then the general counsel of the committee asked the third of the questions involved in this case:

"Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U. S. A.?"

The defendant's reply was:

"Mr. Chairman, I have declined before and decline again.

"Senator McClellan. You are ordered to answer the question."

The defendant stated:

"On the grounds that I have already stated so I need not take the time of the committee, and I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinence or the relevance of an inquiry to me concerning
218 my political beliefs or affiliations. I respectfully decline to answer that question."

In each instance the question was asked, the witness declined to answer, and then he was directed to answer. Hence it is clear that the committee did not acquiesce in the refusal. Consequently the procedure prescribed in Quinn v. United States, 349 U. S. 155 has been followed and its requirements complied with.

The only question that is being contested in this case is whether the subcommittee had the right to ask these questions of the witness. That general subject must be subdivided into several parts. First: Was the subject of investigation of Communism within the legislative function of the Congress? Obviously the answer is in the affirmative. The Congress has legislated on the subject of Communist activities and other activities tending to overthrow the Government by force and violence, as for example, in the Smith Act. This aspect of the matter does not require prolonged discussion. The legality of the creation of the committee on Un-American Activities of the House of Representatives has been often contested,

but the contest has always been resolved in favor of the committee. The same principles are applicable to the Internal Security Subcommittee of the Senate Committee on the Judiciary.

The next aspect that must be considered is whether
219 this particular matter was within the jurisdiction of the committee, which is a different question than whether the general subject was within the legislative power of the Congress. Here again the question must be answered in the affirmative, because by Senate resolution, investigation of the enforcement of the Internal Security Act, laws relating to espionage, sabotage, and the protection of internal security, and of subversive activities generally was reposed in the Committee on the Judiciary, which was clothed with the necessary power. The Committee on the Judiciary in turn delegated that authority, as it had a right to do under the resolution, to its subcommittee on Internal Security.

This brings us to the question whether the specific questions were pertinent to the inquiry. It is well established, of course, that in order to constitute a contempt of the Congress punishable under the statute, a refusal to answer queries must relate to topics that were pertinent to the inquiry that the committee or subcommittee was lawfully conducting. That the general subject concerning which the committee was inquiring was within its jurisdiction has already been indicated. The Court of Appeals has held that the Government has the burden of establishing the pertinency of the questions. But it must be borne in mind in this connection that the common law rules of evidence that prevail in the courts are not binding on Congressional Committees and in fact have no place
220 in hearings conducted by Congressional Committees. Technical relevancy as known at common law is not therefore the test. The terms "pertinency" and "relevancy" are used in the sense of being germane to the subject into which inquiry is being made.

Primarily it is the committee or the subcommittee conducting the hearings that must make the decision whether a particular question is germane to the inquiry and whether the information sought would be helpful. The decision of the committee must be given considerable weight. Necessarily it is subject to Court review, when an attempt is made to prosecute the witness for refusing to answer a question propounded to him, but the decision of the committee that the question is pertinent, and the direction that the question be answered, will not be lightly set aside.

The Court is of the opinion that the question of pertinency of a particular interrogatory addressed to a witness has two aspects or may be approached from two different angles. There are some questions which are pertinent on their face, and their very text is sufficient to establish their pertinency. There are other questions whose pertinency does not appear except by extrinsic evidence. The Court is of the opinion that the questions involved here are pertinent on their very face. Whether a person is a member of the Communist Party or of
221 the Lawyers' Section of the Communist Party is obviously pertinent to an inquiry into activities to overthrow the Government by force and violence, because it has been held by the Supreme Court of the United States that the Communist Party is inherently an organization that seeks to accomplish this very aim. Consequently, even if the Government offered no evidence on the issue of pertinency this Court would hold and does hold that these questions are pertinent on their face.

The Government, however, has gone further in a commendable exercise of caution and submitted evidence showing the reasons for the inquiries, their specific pertinency to the subject matter that the subcommittee was investigating, and the reasons for addressing these questions to the witness. The subcommittee was investigating subversive activities. Testimony has been introduced that the subcommittee had information in its files that the defendant had been a member of a number of subversive

or Communist front organizations; that he had been a member of the International Labor Defense, which was known or believed to be supported by the Communist Party; that he participated in Communist meetings generally. Moreover the committee wanted to know whether he participated in what the committee believed were efforts of the Communist Party to discredit Government witnesses in cases involving Communists. This aspect of the
222 matter arose in connection with one Matusow, who had been a Government witness in a prosecution under the Smith Act, and who later recanted his testimony.

It must be emphasized that all of this testimony was hearsay and would be incompetent and inadmissible if it had been tendered as proof of the facts therein referred to. This testimony, however, was neither offered nor admitted for that purpose. It was admitted for the sole purpose of establishing the pertinency of the questions addressed to the witness. This testimony tended to indicate the subjects in which the committee was interested, why it was interested in those subjects, and how the questions asked of the witness related to those subjects. Obviously hearsay testimony, although not proof of the facts to which it relates, may sufficiently establish and is admissible to establish pertinency of the questions here involved and the reasons for asking them. To take an analogy out of a different field of law, reasonable ground for obtaining a warrant of arrest may be shown by hearsay information, although such information would not be admissible to prove the offense charged in the warrant.

The defendant claims that what the committee was investigating was the witness Matusow who had recanted and changed his testimony in a pending case, and the defendant further contends that to make such an
223 investigation was an encroachment on the judicial power. The Court is of the opinion that this argument involves a non sequitur, for two reasons. In the first place, contrary to the defendant's contention, the Matusow aspect of the investigation conducted by the

subcommittee was only one of the many subjects then under scrutiny and was not the sole topic in which the committee was interested. Moreover, while the Congress has no right to retry a case that is tried in a Court, and no one is more assiduous in preserving the independence of the judiciary and guarding it against encroachment than this Court, nevertheless a distinction must be drawn between an attempt to retry a case and an inquiry whether some proceedings in the case were part of an organized conspiracy to discredit Government witnesses in a series of cases as to which legislation might be possible. It may be added in passing, although it is not necessary, that the investigation did result in the drafting and the introduction of a bill on the subject of practice of law by lawyers who are members of the Communist Party. While it is not necessary to establish the existence of such a measure, that the inquiry did result in the introduction of such legislation is a conclusive demonstration of the fact that the investigation was in aid of legislation and not for any ulterior motive or some purpose in respect to which the Congress had no authority to act.

The suggestion raised in the argument of the defendant's counsel, and advanced by the defendant in a general way, that he is protected by the First Amendment against being required to answer the questions is fallacious. The First Amendment relates to freedom of speech, freedom of the press, and freedom of religion. It guarantees to every person the right to speak, subject of course to certain qualifications. It guarantees freedom to the press. It guarantees to every person the right to worship God in his own way, or not to worship Him at all. There is nothing in the First Amendment, however, which provides, directly or indirectly, that a person who is a witness or is otherwise being legally questioned may not be interrogated concerning matters covered by his freedom of speech, freedom of the press, or freedom of religion. There are many illustrations that may be cited in support of this thought. For example, on a voir dire examination

of jurors during the impaneling of a jury questions are often asked concerning personal views and personal beliefs of the jurors, and such questions are permitted if they are relevant and germane. A juror may not refuse to answer them on the ground that he was protected by the First Amendment. I suppose in connection with the census the Congress might direct the Census Bureau to conduct a religious census in order to find out how many members there were in different denominations, and if the
225 Congress did so a person could not decline to answer the question on the basis of the First Amendment to the Constitution. In other words, freedom to hold any political views or any religious views does not include the right to refuse to state what those views are. Obviously those views may not be inquired into except by lawful authority, and only when they are pertinent, but when it is done under those circumstances there is no right to refuse to answer.

It has been urged that this proceeding is an infringement on the rights and the duties of members of the bar to defend the accused. The right and the duty of a member of the bar to defend the accused in a criminal case is and must be recognized by law. It is part of the traditional function of the bar. The Constitution provides that every person accused of a crime is entitled to counsel. In order to effectuate this constitutional guarantee it is necessary to extend full and unquestioned freedom to every member of the bar to accept a retainer in any criminal case and defend the accused. But this right stops where the duty and the function of the advocate of counsel ceases. It is entirely proper to inquire into the activities of a member of the bar that are beyond the legal and ethical scope of his duties as counsel. It is entirely proper to inquire into his activities or connections with his clients that are beyond merely representing them in court. In this case the defendant
226 was not questioned concerning his retainer or concerning his representation of his clients. Conse-

quently the appeal to the ethics of the bar is out of place. He was interrogated whether he personally was a member of the Communist Party; whether he personally had ever been a member of the Communist Party; and whether he personally was or had ever been a member of the Lawyers' Section of the Communist Party. These questions had no bearing on his work for his client.

Finally we come to the question whether willfulness in the refusal to answer has been established. It has always been held beginning with the Sinclair case and ending with the recent Quinn case in the Supreme Court and in the Fields case in this jurisdiction that a refusal to answer in order to be punishable must be willful. Willfullness does not mean bad faith or an evil motive. By willfullness in this connection, as the authorities have established, is meant that the refusal was deliberate and intentional and not merely accidental or inadvertent.

The Court is of the opinion that the Government has established all of the elements of this charge beyond a reasonable doubt and finds the defendant guilty on each of the three counts.

* * * * * * * * * *

237 The Court: Harry Sacher, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of six months, and that you be fined $1,000.

* * * * * * * * * *

240 **On Defendant's Motion for Hearing on Qualification of Grand Jurors**

Mr. Rein. I would like to state that with respect to one motion, the motion to challenge the grand jurors, I do not wish to argue that motion. I don't wish to withdraw it; but I feel Your Honor would be precluded from granting it, in view of the Emspak case.

The Court. In other words, you realize the Court is

duty bound to deny the motion; but you want to save the point, if possible.

Mr. Rein. That is right.

The Court. Very well. The motion is denied.

Mr. Rein. I wish to save the point, but I do not wish to argue the motion.

The Court. You want to save the point for possible review by the Supreme Court.

241 Mr. Rein. Yes.

The Court. I will deny the motion.

On Defendant's Motion to Dismiss the Indictment

* * * * * * * * * *

245 Mr. Hitz. * * *

* * * * * * * * * *

246 Our position in the case is that there is implicit in the use of the word "refusal" that it be a deliberate and intentional choice of two courses of action. If the indictment and the statute had said a failure to answer, it would then be necessary to indicate that the failure was one arising from a deliberate choice of action, that is, a mental intent as distinguished from an accident or an impossibility to comply.

But where the word "refusal" clearly connotes an intentional and deliberate failure to comply, then the element that is required here, the mental element, is in that word and we find it, we say, in the indictment, the same as we find it in the statute. There is implicit in the word "refusal," we say, an intentional and deliberate choice of action.

* * * * * * * * * *

250 The Court. This is a motion by the defendant to dismiss an indictment charging him with contempt of Congress in that he unlawfully refused to answer certain pertinent questions propounded by a Congressional Committee, as set forth in the indictment. It is urged that

failure to allege that the refusal was willful, deliberate or intentional is a vital defect in the indictment.

There is no doubt that as a matter of proof it is necessary to show at the trial that the refusal was not inadvertent; that it was intentional and willful, not in the sense that it was necessarily in bad faith, but that it was not accidental but was deliberate. Whether failure to include an allegation to that effect vitiates the indictment.
251 is another matter.

When we come to deal with sufficiency of indictments, cases dealing with technical forms of indictments decided prior to the advent of the present Federal Rules of Criminal Procedure do not constitute any authority. One of the purposes of the rules was to jettison the old rulings under which a person might go unwhipped of justice, though he had committed a serious offense, merely because the draftsman of the indictment omitted some word or phrase which did not actually affect the meaning of the accusation.

These technical decisions originated in an era when almost every felony was punishable by death and judges were looking for pretexts to prevent the imposition of the death penalty in cases in which they thought the penalty was not morally justified. That line of reasoning, of course, is now antiquated and outmoded. These very technical decisions that originated in England are no longer followed in the land that gave them birth. We no longer scrutinize indictments for technical correctness.

The contents of an indictment are governed now by Rule 7 (c) of the Federal Rules of Criminal Procedure, which provides merely that "the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."
252 It has been explained by the authorities construing this rule that the indictment must meet two tests. First, it must set forth the essential facts, with sufficient definiteness in order that the defendant may be apprised of the exact offense with which he is charged

and the precise accusation that he will have to meet at the trial. Second, it must be sufficiently definite in order that the defendant may be able to avail himself of the plea of former jeopardy in the event that an attempt should be made at a subsequent time to prosecute him for the same offense.

Obviously this indictment meets these two tests, and also complies with the requirements of Rule 7 (c). This conclusion is fortified by Rule 52 (a) of the Federal Rules of Criminal Procedure, known as the Harmless Error Rule, and which reads as follows:

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Even if the contention were correct that a defect in this indictment existed as claimed by the defendant, it would not affect substantial rights. But the Court is going further and holds definitively that this indictment is not defective. It complies with the requirement of law.

253 The Court is not unmindful of the opinion to the contrary rendered in the Southern District of New York, in United States v. Lamont, 18 Federal Rules Decisions 27, at page 32. The Court observes, however, that the learned judge who wrote the opinion in that case, and for whom this court has a high personal regard, does not cite any authorities in support of his ruling that since willfulness or deliberate, intentional refusal to answer is an essential element of the offense which the Government must prove, it must also be pleaded in the indictment. The Court, with respect and deference to this learned judge, is of the opinion that this ruling is contrary to the modern trend of doing away with technicalities in indictments.

The Court has also been apprised of the fact that a brother judge in this district has arrived at the same conclusion as was reached in the Southern District of New York, in an unreported decision, but that still another judge in this district, in the very same case, has made the

same ruling as that which this Court is now making in this case.

The motion to dismiss the indictment is denied.

254 **On Defendant's Motion for Bill of Particulars**

. . . . . .

255 Mr. Hitz. I quit agree the information would be helpful. But we are not required to allege our evidence in the indictment, and we don't think our evidence is subject to being sought out in advance.

The Court. You are not required to allege evidence. The question is, however, is the defendant asking for evidence or is he asking you what you are going to contend, not how you are going to prove your contention.

Mr. Hitz. Quite right. In fact, he is asking us for our legal argument with respect to the applicability of the resolution creating this committee of the House. For example, anyone can determine from reading the resolution and recalling the decision in the Barsky case, and the Lawson and Trumbo cases, that the question whether or not the witness was a member of the Communist
256 Party when he appeared before the committee was pertinent to that inquiry.

. . . . . .

258 So we think that the defendant is not even asking for evidence, by his motion for a bill of particulars, but he is asking us for our legal argument as to how membership in the Communist Party constitutes subversive activity in light of the resolution. And we think certainly he is not entitled to it. In fact, I will amend what I said at the beginning that it might be helpful. It is hard to see how it would be helpful to him at all.

The Court. Well, I can see where it would be helpful, because he would be able to prepare for the argument that you plan to make at the trial.

Mr. Hitz. Well, it would be helpful in that he would have us bound by it as if we had alleged it in the indict-

ment, he would contend. And I think what I have said here applies as well to all three counts in the indictment the second having to do with past membership in the party, which is likewise covered by the decision in the Lawson and Trumbo cases, with respect to the other committee; and the third has to do with membership in the lawyers' section of the Communist Party, which we liken to the Lawyers' Guild or to the Screen Writers' Guild in the Trumbo case.

. . . . . .

Mr. Rein. . . .

259 I think that regardless of what the scope of the resolution might be, each particular investigation carried on by a committee must have something more specific before it to which it considers the particular questions are relevant.

This committee is a standing committee that is carrying on investigations year after year after year. I think the particular thing I am concerned about which I think would be relevant in argument before Your Honor is what particular matter would they have under inquiry in this particular investigation. And I think Mr. Hitz' statement that they had whatever could come within the scope of the resolution is precisely the kind of thing I think is not sufficient or adequate to help us prepare for trial.

The Court. Are the minutes of the particular committee hearing at which this alleged refusal took place available to you?

Mr. Rein. Yes, Your Honor.

The Court. Can't you determine that from those minutes?

Mr. Rein. If I thought I could, I would be satisfied with that. I am not satisfied, however, with Mr. Hitz' answer. He seems to think he will be bound by that and otherwise will go far beyond it.

The Court. But those minutes are available?

Mr. Rein. Yes.

The Court. That is what I wanted to be sure of.

Mr. Rein. Oh yes. The minutes are printed, the report is printed, and they are all available as public documents.

The Court. In criminal cases bills of particulars are sparingly granted. When granted, it is ordinarily for the purpose of amplifying the factual allegations of an indictment which perhaps may be too indefinite or vague. In this case, however, the motion really seeks, in the guise of particulars, not facts but rather matters that are questions of law and fact mixed and involve the line of reasoning the Government expects to adopt in sustaining its position at the trial. The Court is of the opinion that that is not one of the offices of a bill of particulars. The motion is denied.

* * * * * * * * * *

Filed April 11, 1956

Govt. Exhibit No. 1

RESOLUTION

Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws: Now, therefore, be it

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, abotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The Committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. The cost of stenographic services to report hearings of the committee or subcommittee shall not be in excess of 25 cents per hundred words. Subpenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business; except that a lesser number to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

SEC. 3. The committee, or duly authorized subcommittee, shall have power to employ and fix the compensation of such officers, experts, and employees as it deems necessary in the performance of its duties, and is authorized to utilize the services, information, facilities, and personnel of the various departments and agencies of the Government to the extent that such services, information, facilities, and personnel, in the opinion of the heads of such departments and agencies, can be furnished without undue interference with the performance of the work and duties of such departments and agencies.

SEC. 4. The expenses of the committee, which shall not exceed $10,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee on or before January 31, 1951.

Filed April 11, 1956

Govt. Exhibit No. 2

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

This is to certify that at the meeting of the Senate Committee on the Judiciary on Thursday, January 20, 1955, the following members being present,

Senator Kilgore, Chairman
Senator Eastland
Senator Kefauver
Senator Johnston

Senator Hennings
Senator McClellan
Senator Daniel
Senator O'Mahoney
Senator Wiley (late)
Senator Langer
Senator Jenner
Senator Watkins
Senator Dirksen
Senator Welker
Senator Butler,

the following resolution was adopted on motion of Senator Eastland:

"RESOLVED, by the Committee on the Judiciary, That the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a special Subcommittee of the Committee on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose."

JOSEPH A. DAVIS
Joseph A. Davis
Chief Clerk

March 12, 1956

Filed April 11, 1956

Govt. Exhibit No. 3

RESOLUTION

Resolved, That in holding hearings, reporting such hearings, and making investigations as authorized by section 134 of the Legislative Reorganization Act of 1946, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate, insofar as they relate to

the authority of the committee to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its Territories and possessions, including but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence, the Committee on the Judciiary, or any subcommittee thereof, is authorized from March 1, 1955, through January 31, 1956, (1) to make such expenditures as it deems advisable; (2) to employ on a temporary basis such technical, clerical, and other assistants and consultants as it deems advisable; and (3) with the consent of the heads of the department or agency concerned, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

SEC. 2. The expenses of the committee under this resolution which shall not exceed $260,000 shall be paid from the contingent fund of the Senate by vouchers approved by the chairman of the committee.

SEC. 3. This resolution shall be effective as of March 1, 1955.

Filed April 11, 1956

Govt. Exhibit No. 8

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

This is to certify that at the meeting of Monday, February 7, 1955, of the Subcommittee to Investigate the Ad-

ministration of the Internal Security Act and other Internal Security Laws under S. Res. 366 (81st Congress) of the Senate Committee on the Judiciary, the following members being present,

Senator James O. Eastland, Chairman
Senator Olin D. Johnston
Senator John L. McClellan
Senator Thomas C. Hennings
Senator Price Daniel
Senator William E. Jenner
Senator John Marshall Butler,

the following resolution was proposed by Senator Johnston and adopted by the said Subcommittee:

"Resolved, by the Internal Security Subcommittee of the Committee on the Judiciary, That pursuant to subsection (3) of Rule XXV, as amended, of the Standing Rules of the Senate (S. Res. 180, 81st Cong., 2d sess., agreed to February 1, 1950) and the resolution of the Judiciary Committee thereunder, approved January 20, 1955, a quorum of the subcommittee for the purpose of taking sworn testimony shall consist of not less than two Senators of such subcommittee, except when the subcommittee in its judgment, two-thirds of the subcommittee members concurring, may authorize a quorum of one Senator of such subcommittee for the purpose of taking such testimony."

JOSEPH A. DAVIS
Joseph A. Davis
Chief Clerk
Senate Committee on Judiciary

March 12, 1956

Govt. Exhibit No. 10

Filed April 11, 1956

84th Congress
1st Session

S. 2326

IN THE SENATE OF THE UNITED STATES

June 27, 1955

MR. EASTLAND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To require any attorney at law practicing before a Federal court, or appearing before a congressional committee as counsel for a witness testifying before such committee, or appearing as counsel before any department or agency in the executive branch of the Government of the United States, to file a non-Communist affidavit.

Govt. Exhibit No. 12

Filed April 11, 1956

84th Congress
1st Session

Committee Print

STRATEGY AND TACTICS OF WORLD COMMUNISM

(Significance of the Matusow Case)

Report of the

Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws

to the

Committee on the Judiciary United States Senate

Eighty-Fourth Congress

First Session

Pursuant to S. Res. 58 on the
Significance of the Matusow Case

April 6, 1955

STRATEGY AND TACTICS OF WORLD COMMUNISM

The Significance of the Matusow Case

Background

Late in 1954, Harvey M. Matusow, who had been serving as a witness and informant for Government agencies against the Communist Party of the United States since 1950 suddenly became an important figure in a stepped-up Communist drive against the security, investigative, and en-

forcement agencies of the United States Government, and against ex-Communists helping those agencies. To approach a study of this development, some background information is desirable.

The Communist Party, U. S. A., Under Fire

Louis B. Nichols, assistant to FBI Director J. Edgar Hoover recently disclosed[1] that—

> To date, 134 Communist Party leaders have been indicted for violation of the Smith Act. In each case where convictions have resulted—and in securing eighty-three convictions, there have been only three acquittals—former Communists and onetime confidential informants have supplied the evidence which led juries to conclude the persons were guilty beyond a reasonable doubt. If they are to survive, the Communists know that the F. B. I. and its sources of information must either retreat or be destroyed.

These developments had caused the Communist Party grave concern. In his "History of the Communist Party of the United States" published in 1952, William Z. Foster had devoted an entire chapter to what he called the "Persecution of the Communist Party." He declared: "The Government's attack against the Communist Party confronts it with many urgent tasks." He added, "Especially the party will have to become skilled in defending its members and organizations, and it must intensify its vigilance to protect itself from provocateurs and stool pigeons" (p. 521).

Attorneys in the Department of Justice, as well as the Communist Party itself, realized that the backbone of the series of cases against the party was the group of witnesses the Department was able to mobilize. Assistant Attorney General William F. Tompkins, in charge of the Internal

[1] In a speech before the Freedom Forum of the Anti-Defamation League on April 28, 1955.

Security Division of the Department of Justice, outlined the picture:[2]

> Because of the secrecy with which the Communist Party operates, the job of ferreting out the Communist conspirators, exposing them for what they are and prosecuting them successfully is a difficult one. When people are engaged in a conspiracy to overthrow the Government, they meet only their confederates; they meet in cellars; in dark alleys; in isolated places. They utilize every device to cover up their operations. There is only one way to uncover such a plot and that is to use the information furnished by former Communists and by confidential informants. And that is why the Communist Party has always fostered a vigorous campaign to destroy the effectiveness of the testimony offered against party leaders by former Communists. They have coined the term "informer" as a term of opprobrium in characterizing all Government witnesses in Communist cases.

The long range objective of the Communist Party was to crack the Government's prosecutionary structure and smash it.

The history of the Communist movement discloses that when once a Communist has defected or is suspect and seeks to reestablish himself in Communist good graces, he is compelled to humble himself completely as evidence of his good faith. By way of example, let us cite the testimony on February 6, 1947, before the House Committee on Un-American Activities of Ruth Fischer, a former leading German Communist, in reference to Gerhart Eisler, her brother, a representative in the United States of the Communist International:

> Eisler had been in disgrace during 1928, 1929, and 1930, and everybody of the Communist Party in Berlin expected his expulsion from the Communist Party of

[2] In a speech delivered on December 4, 1954, at Mount Holyoke College.

Germany, because of his rebellion against Stalin at that time.

Then he was sent to a mission into China, with the GPU delegation, to purge rebellious Chinese Communists. At that time Eisler's mission was not a high one. * * *. In these Chinese purges he behaved so cruelly and carried out the orders so well, that the report about him in Berlin said that he was really the hangman of the rebellious Chinese Communists, who were sentenced by the decisions of Moscow. * * *

In 1933, when I met him in Paris, on his first mission to the United States, he was in the best of spirits, because his second Comintern assignment was a much higher one than his previous assignment to China, and he regarded it as a complete rearrangement of his relationship with the Politburo.

In other words, in order to establish his bona fides with the Communist Party, a defector had to demonstrate his effectiveness in doing a hatchet job on anti-Communists. Communist defense strategy demanded that a fruitful source of evidence against the party be discredited and destroyed and that those seeking the successful prosecution of the Communists be demoralized and routed. The audacity of this frontal assault upon those responsible for our national security by agents of a foreign, subversive power is no less remarkable than the extent to which this assault has found support and credence outside the ranks of the Communist Party.

"The revelations of Harvey Matusow have put the masters of the frameup into panic," gloated the Daily Worker of February 7, 1955.

The Matusow enterprise was not and could not be a one-man project. Nor was it merely a project emanating from the brains of Cameron & Kahn, the publishers. It had far wider ramifications, as we have seen, involving the cooperation of Nathan Witt, Mary M. Kaufman, Harry Sacher, Hyde Tibbs, Carl Marzani, Elizabeth Gurley Flynn, Clinton Jencks, and others. Synchronized with the production of

the book and demands for a new trial in the cases of the 13 Communist leaders and that of Clinton Jencks was the active campaign along these lines conducted by the Communist press.

MATUSOW'S BOARD OF LEGAL STRATEGY

Subversion Via the Law

In its report dated April 20, 1953, the Subversive Activities Control Board held that the Communist Party, U. S. A. "strives for the establishment of a dictatorship of the proletariat in the United States; a goal which would rob the American people of the freedoms they have forged." To put it another way, it seeks to undermine and destroy the Government of the United States and substitute a dictatorship, which Lenin has defined as "power based directly upon force and unrestricted by any law."[1]

The Matusow case brings to the fore how the Communist Party uses its skilled legal technicians, its lawyers, to disrupt and paralyze the machinery of justice with particular reference to the prosecution of Communists' cases. It stands to reason that if the Communist Party can immobilize and throw out of joint the prosecutionary machinery of the Justice Department, the result inevitably will be to render powerless the law of the land and to open the way for the Communist Party to pursue freely its efforts to subvert our Government.

In this particular instance, we are confronted with an assault upon our legal structure without parallel in its audacity and scope. With Matusow as the chief instrument, the legal strategy board of the Communist operation consisted of Nathan Witt, former secretary of the National Labor Relations Board; Abner Green, Executive Director of the Civil Rights Congress; Lawrence Emery, Ralph Shikora, and Mary M. Hamilton.

---

[1] Lenin, Selected Works, vol. XI, p. 32 (International Publishers, New York, 1943).

trust as ordinary lawyers, each with his own voluntarily selected clients, and each one pursuing his profession in his own individual way according to accepted standards. On the contrary, they constituted part of a legal phalanx to further the subversive aims of the Communist Party and operating under Communist discipline. Asked to testify as to the truth of a report that they were all members of a special lawyers' section of the Communist Party under a section organizer named Abraham Unger, they all invoked the fifth amendment, with the exception of Mary M. Kaufman who was serving as counsel for Communist cases in Denver, and was not required to testify here.

Nathan Witt, Master Legal Strategist

On August 3, 1948, David Whittaker Chambers appeared before the House Committee on Un-American Activities and stated:

> For a number of years I had myself served in the underground, chiefly in Washington, D. C. * * * It was an underground organization of the Communist Party developed, to the best of my knowledge, by Harold Ware. I knew it at its top level, a group of seven or so men. * * * The head of the underground group at the time I knew it was Nathan Witt, attorney for the National Labor Relations Board.

When questioned as to the truth or falsity of this statement, Witt invoked the fifth amendment (pp. 757, 758).

From 1933 to 1940, Witt had devoted his talents to operations within the Government itself, including the Agricultural Adjustment Administration and the National Labor Relations Board of which he ultimately became the Secretary.

When Mr. Witt was asked, "Were you responsible during that period for the employment by the National Labor Relations Board of any person or persons known to you at the time to be Communists?", he replied: "I refuse to

answer the question on the grounds that under the fifth amendment I may not be compelled to be a witness against myself" (pp. 786, 787). Having ended his career within the Government, Witt has pursued activities in behalf of the Communist Party against the Government from without, the Matusow case being one major operation. From the outset, the hand of Nathan Witt has appeared at decisive points in its development.

As early as June 1954, at least 3 months before the long-distance telephone conversation between Matusow and Kahn to Dallas, Tex., Witt was taking the initiative, keeping himself discreetly in the background wherever possible. Let the record speak on this:

> Mr. Sourwine. You became aware of the possibility of a recantation by Mr. Matusow of his earlier testimony when Bishop Oxnam made his speech and referred to that subject in June of 1954.
>
> Mr. Witt. Yes, sir.
>
> Mr. Sourwine. You thereafter followed closely the developments in the Matusow case and told Rod Holmgren, publicity director of Mine and Mill, to do so?
>
> Mr. Witt. Well, that is a little too general. Just a word on that. You say the Matusow case. I followed closely any developments relating to a possible recantation on Mr. Matusow's part, and I did work with Mr. Rod Holmgren of the Mine, Mill staff in that connection.
>
> Mr. Sourwine. Was it he, Mr. Holmgren, or you wrote Mr. Bishop Oxnam in July 1954 requesting that information?
>
> Mr. Witt. It was Mr. Holmgren (p. 764).

During the early part of 1954, Witt admitted he had made contact with Carey McWilliams, editor of the Nation, and that Rod Holmgren, publicity director of the Communist-controlled Mine, Mill, and Smelter Workers, had also been in contact with Martin Solow of the same magazine. It is interesting that there appeared in the Nation for April

10, 1954, an article on "The Informer," by Frank J. Donner, identified by Harry Sacher as an attorney who occupied joint office space with him (p. 829). Donner defended Albert Blumberg, a Communist leader charged with violating the Smith Act, according to the Daily Worker of January 13, 1955, page 3. The Nation article clearly forewarned of the campaign underway to discredit Government witnesses in Communist cases. In advertising this article, the Nation has quoted an anonymous "noted civil liberties lawyer" to the effect that "it would blow up the whole dirty mess created by the informers." Donner's article opens as follows:

> Today scores of political informers, most of them ex-Communists, have become circuit-riding witnesses, appearing again and again in Smith Act and similar prosecutions, deportation proceedings, and before legislative committees.

At least 1 month prior to Kahn's long-distance phone conversation with Matusow in Dallas, Witt was conversing with his legal associate, John T. McTernan, in the Jencks case, in regard to the possibility of a book by Harvey Matusow and the possibility that "we would in one way or another lend assistance to that book-writing project on Mr. Matusow's part" (pp. 765, 766). The book was an integral part of the strategy of McTernan and Witt in seeking a new trial for Clinton Jencks and an affidavit from Matusow.

* * * * * * * * * * *

Harry Sacher Defies the Subcommittee

Complacent Americans are for the most part unmindful of the destructive potentialities of a highly organized and brazen minority operating under the protective shelter of our democratic safeguards. They have little realization of the lengths to which these conspirators will go if afforded sufficient leeway.

In exploiting the Matusow case and the support it has received in certain circles, the Communists are by no means content to limit its impact to the attempt to secure a reversal in the trial of the Communist leaders, Elizabeth Gurley Flynn et al., and in the Jencks case. They are out to wreck the Government's prosecutionary machinery in its entirety and the investigative functions of congressional committees dealing with subversive activities.

When Harry Sacher took the stand on April 19, 1955, unaccompanied by counsel, the subcommittee knew that it was confronted with a veteran defender of Communist cases all the way back to 1937 when he was associated with the International Labor Defense, which Attorney General Francis Biddle had designated as "the legal arm of the Communist Party." Sacher has played a major part in the defense of cases involving Communist leaders under the Smith Act since 1949. If any single quality can be said to characterize Mr. Sacher's appearances in defense of Communist cases, it may be said that it is his attitude of defiance toward constituted authority, thus repudiating the oath he took as a member of the bar to respect that authority. He utilized his appearance to defy the authority of the subcommittee in refusing to answer the following questions on the ground that he would not "discuss my beliefs, religious, political, economic, or social." He did not invoke the fifth amendment.

1. "Are you, Mr. Sacher, a member of the Communist Party, U. S. A." (p. 836)?

2. "Are you now a member of the Communist Party of the United States" (pp. 836, 837)?

3. "Have you ever been a member of the Communist Party of the United States" (p. 837)?

4. "Are you now or have you ever been a member of the lawyers' section of the Communist Party, U. S. A." (p. 838)?

Sacher used the witness chair to voice the plea for "all Americans to join me in resisting inquiries of this kind (p. 839).

In the course of his testimony, Sacher admitted that he had served a prison sentence for contempt of court (before Judge Medina in the trial of the 11 top Communist leaders) after his contempt conviction had been affirmed by the Supreme Court of the United States.

At this point, it is well to note the evidence that Harry Sacher was a member of the Communist Party in its higher echelons. According to the testimony of John Lautner, a former member of the National Review Commission of the Communist Party, Sacher was present in January 1950 at a birthday celebration in honor of Alexander Bittelman, a leading theoretician of the party, which was held in the national board room of the national committee of the Communist Party at 35 East 12th Street in New York City. When asked about this incident, Sacher said he did not recollect it. But he did not deny it.

Sacher held to his position despite his being directed to answer and despite the explanation given him from the Chair by Senator McClellan:

> But when we come to the security of our country, an organization that is dedicated obviously to subversion purposes as an objective, I think it becomes the duty of the Congress of the United States and also the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations at some time and the knowledge may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks the question is proper and directs you to answer it (p. 838).

Mr. Sourwine, as chief counsel of the subcommittee, added an additional consideration to show the germaneness of the questions:

> Mr. Sourwine. Mr. Chairman, among the measures under consideration by this committee is proposed leg-

islation for the purpose of fixing additional standards with respect to the practice of law in the Federal courts. Among the suggestions for inclusion in such legislation is a suggestion which would prohibit members of the Communist Party from practicing in Federal courts. It is germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal court by persons who are Communists and by persons who are defending Communists. I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee (p. 835).

The subcommittee feels that by his refusal to answer the above questions in the face of all directions from the Chair and the explanations given, and the added fact that in the course of his testimony he gave appearance of being fully conscious of the gravity of his conduct and pursued it nonetheless, Sacher is flagrantly in contempt of the subcommittee. He acted like a man seeking a court test of the power and authority of the subcommittee.

Finding and Conclusions

* * * * * * * * * * *

30. Because the Communist Party is dedicted to the overthrow of the Government of the United States by force and violence, and to this end each party member, lawyer as well as nonlawyer, is dedicated under the force of the party's discipline, lawyer members of the Communist Party are thus flying in the face of their obligation to serve as officers of the court and to uphold the Constitution of the United States.

Recommendations

1. That the Government in its normal program for safeguarding the judicial process and the integrity of all Government witnesses, continue to give special attention to con-

certed efforts of the Communist conspiracy to subvert such processes and to corrupt or victimize such witnesses.

2. That the Department of Justice lay before a grand jury the facts relating to the apparent conspiracy to obstruct justice involving Matusow, Witt, Kahn, and others.

3. That our hearings and this report be transmitted to appropriate authorities in New York State with a view to disbarment of the four members of the bar of that State who refused to testify respecting their Communist affiliations.

4. That legislation be enacted to prohibit appearances as counsel in Federal courts or before congressional committees or executive departments or agencies of the Federal Government by attorneys who have not by affidavit declared that they are not members of the Communist Party or any organization which has for its purpose the destruction of the Government of the United States by force and violence, or who have persisted in refusal, under oath, to testify respecting their Communist affiliations.

5. That legislation be enacted to strengthen regulations for the control of passports so that they may not be used for unauthorized travel.

6. That our hearings and this report be transmitted to the Veterans' Administration with a view to reexamination by that agency of its entire file on Harvey Matusow.

* * * * * * * * * * *

Def. Exhibit No. 13

Filed March 12, 1956

STRATEGY AND TACTICS OF WORLD COMMUNISM

THE SIGNIFICANCE OF THE MATUSOW CASE

HEARING

BEFORE THE

SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Eighty-Fourth Congress
First Session
Pursuan to S. Res. 58
February 21, 1955

PART 1

Printed for the use of the Committee on the Judiciary

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 318, Senate Office Building, Senator James O. Eastland (chairman of the subcommittee) presiding.

Present: Senators Eastland, Johnston, McClellan, Daniel, Jenner, and Watkins.

J. G. Sourwine, chief counsel; Alva C. Carpenter, associate counsel; Benjamin Mandel, director of research; and Robert C. McManus, professional staff member.

The Chairman. The committee will come to order.

Mr. Matusow, step around, please, sir.

Mr. Matusow. Pardon me, sir.

The Chairman. Hold up your right hand. Do you solemnly swear the testimony you are about to give to the Internal Security Subcommittee of the Committee on the Judiciary of the Senate of the United States is the truth, the whole truth, and nothing but the truth?

Mr. Matusow. I do.

The Chairman. The witness before the Subcommittee on Internal Security today is Harvey M. Matusow.

Mr. Matusow has previously appeared before us in executive session on February 13, March 5, and March 13, 1952, and in public sessions on February 13, 1952, March 5, 1952, March 13, 1952, and October 8, 1952. In his previous appearances, he gave sworn testimony regarding the Institute of Pacific Relations, certain youth organizations and the International Union of Mine, Mill and Smelter Workers. Mr. Matusow has since made public statements recently to the effect that he lied when he testified before this subcommittee and on other occasions. The purpose of the hearing now commencing is to inquire into this whole matter.

It is interesting to note that in regard to his testimony concerning Mr. Owen Lattimore, Mr. Matusow has misquoted himself and then recanted the misquotation. Actually, his testimony concerning Lattimore's book being pushed by the Communist bookstores was only confirmation of documentary evidence already in our record.

As a result of testimony taken in this hearing, it may appear that Mr. Matusow told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth. It may appear that part of what he told us was true and part was untrue. It may appear that he never tells the truth by intent. It may appear that his recent conduct is designed simply to call attention to a book which is soon to be published under his signature, and that his motive for this shabby performance is merely low personal greed. It may appear that he has been the victim of pressure brought by Communists, as well as those who have a vested interest in concealing the Communist conspiracy, and he has finally broken under this pressure. Or there may be still another explanation.

It must be clearly understood that Harvey Matusow does not come before us this morning merely as an individual. He is or he says he is, a former member of the Commu-

nist Party who has made a previous confession of wrongdoing as a Communist and then given evidence to expose the Communist conspiracy. He is one of many ex-Communists who have given similar evidence. That is not to say that his self-incrimination of lying under oath automatically convicts others of the same offense, nor that the finger of scorn which he points at himself must be pointed also at those who heard his allegedly false testimony. In the centuries during which the petit jury and grand jury have been part of our legal tradition, neither has been discredited by the fact that there have been occasional appearances of liars before each.

Those who seek to expose the Communist conspiracy *and also those who struggle to conceal it* are both fully aware of the importance of the ex-Communist in this world-wide struggle to preserve human freedom. The informed enemy of communism knows that enormous quantities of priceless information have been provided by former Communists who have repented and now seek to undo the wrongs they did in the past by active opposition to communism. The Communist, as well as those who have a vested interest in concealing the truth about the conspiracy, know this just as well as we do. That is the reason that the assault on the ex-Communist who is willing to tell what he knows has been conducted with such unbridled fury.

We recall the vicious assault on Whittaker Chambers and Elizabeth Bentley after they came forward with their stories of the Communist traitors who had been stealing documents from the United States Government and turning them over to Soviet agents during a period of almost 10 years. Whittaker Chambers proved his case when he produced his famous "pumpkin papers," which were a collection of approximately 200 of these documents that he had obtained from the traitors in Government. Some of these documents were in the actual handwriting of Alger Hiss and Harry Dexter White. Elizabeth Bentley told

this Subcommittee in detail the methods by which Communist agents penetrated the Government, rose in the Government, made policies in the Government, and protected one another when they were threatened with dismissal from the United States Government. The subcommittee put her testimony through the crucible in our inquiry into interlocking subversion in Government departments. We found hundreds upon hundreds of documents which showed that her description of the methods of the conspiracy had been flawlessly truthful. We are still finding documents which support the testimony she originally gave us at a time when she did not have access to a single one of them.

At the first public session held by this subcommittee on July 25, 1951, the then chairman, the late Senator Pat McCarran of Nevada, had said this, and I quote:

> In such an investigation as this, where a possible conspiracy is being examined, very often the only evidence obtainable derives from persons who once participated in the conspiracy. Only eyes that witnessed the deeds, and ears that heard the words of intrigue can attest thereto. Thus, ex-Communists, and agents of the Government who posed as Communists, often are the only sources of evidence of what transpired behind doors closed to the non-Communist world.

This situation which Senator McCarran pointed out, with respect to communists, is not peculiar to the Communist conspiracy alone. It is a well-recognized principle of law that:

> Conspiracies need not be established by direct evidence of the act charged. They may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused which discloses a community of unlawful purpose.

existence of the agreement or assent of the minds need not be proved directly, but may be inferred by the jury from the facts proved.[1]

The subcommittee in this series of hearings hopes to determine what is the truth. The subcommittee may be able to show, in some instances, what are lies. The subcommittee probably can and will try to make a record as to just what Mr. Matusow now says the truth is. The subcommittee also will seek to determine, from the testimony of this witness and others, all the facts surrounding this case, and to make as complete a record of those facts as possible.

The subcommittee does not propose to be sidetracked into any examination or consideration of matters not involved with the testimony of Harvey Matusow, his public utterances, and the preparation and publication of the book soon to be published under his name.

Now, Mr. Matusow, you are here under subpena of the Internal Security Subcommittee. We have a number of questions that we desire to ask you, sir. We want your answers to be responsive to the questions and to be as short as possible to explain your point in detail.

Before the hearing is over, if you desire to make a statement or volunteer information, you will certainly be given the opportunity to do so.

Mr. Sourwine, you may proceed with the witness.

[1] Am Jur Vol II Conspiracy, par 38

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 828

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUBERT T. DELANY,
52 Broadway,
New York, New York,

FRANK J. DONNER,
342 Madison Avenue,
New York, New York,

Attorneys for Petitioner.

Of Counsel:

TELFORD TAYLOR,
400 Madison Avenue,
New York, New York.

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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting the petitioner of violating Title 2, United States Code, Section 192.

Opinions Below

The opinions of the trial court denying petitioner's pretrial motions and holding him in contempt are reported at 139 F. Supp. 853, 855 and appear in the record at R. 64-74, 75-80. The opinion of the court below which first affirmed petitioner's conviction, is reported at 240 F. 2d 46. The opinion of the court below on remand is as yet unreported and is attached hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1958 (Appendix A, *infra*). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

Questions Presented

Petitioner, a lawyer, was subpoenaed to appear at an investigation of the Subcommittee on Internal Security of the Senate Judiciary Committee, conducted pursuant to Senate Resolution 366, *infra*. The matter under investigation was the recantation of Harvey Matusow, a former witness before the subcommittee, and the circumstances leading to it. The chairman of the subcommittee had announced that the subcommittee would not be sidetracked into any other matter. At the hearing, conducted by two members of the subcommittee, petitioner, who then represented clients in a pending motion for a new trial based upon an affidavit by Matusow, after protesting that the interrogation dealt with a matter then *sub judice* and invaded freedom of advocacy, answered all questions put to him about his relationship to Matusow. He was thereafter asked whether he had ever served a prison sentence. When he specifically challenged the pertinence of this question, the chairman of the subcommittee likewise expressed doubts about its pertinence to the announced subject under inquiry. The subcommittee counsel, Mr. Sourwine, then explained that the question was pertinent to the subcommittee's consideration of a measure barring Communists from practice in the Federal courts. In order to link the question about the prison sentence to this new subject-matter of qualifications to practice, Mr. Sourwine was directed to "lay a foundation" by first asking the witness concerning his present or past Communist Party affiliations. All of the remaining questions, of which the witness

declined to answer the three here in issue, were confined to this area of Communism, petitioner's personal background and private life. The questions on their face related exclusively to the subject of qualifications of practice and not to the recantation of Matusow. Nor was petitioner enlightened as to their relationship, if any, to the latter subject.

The questions raised by petitioner are:

1. Whether, in view of the language of the Resolution, the subcommittee's departure from the announced subject under inquiry, and the other circumstances of the case, the pertinence of the questions which petitioner declined to answer to the matter of Matusow's recantation "was made to appear with undisputable clarity" within the meaning of *Watkins* v. *United States*, 354 U. S. 178, 214-215.

2. Whether the subcommittee had legislative jurisdiction to interrogate petitioner about matters designed to injure and expose him rather than to aid in the achievement of a legislative purpose.

3. Whether testimony to establish the nature of the question under inquiry was properly admitted and considered at petitioner's trial under the contempt statute, when such testimony was at variance with the scope of the question under inquiry as communicated to petitioner at the hearing.

4. Whether the Resolution creating the Subcommittee on Internal Security of the Senate Judiciary Committee is unconstitutional on its face, or as applied through the questions put to petitioner in that

(a) it exceeds the investigative or legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured to petitioner by the First Amendment;

(d) it violates the principle of separation of powers; or

(e) it abridges the right to counsel.

5. Whether the subcommittee was authorized by the Committee on Internal Security to conduct the investigation which is involved in this case.

6. Whether an indictment under 2 U. S. C. 192 is insufficient because it fails to allege or specify

(a) that the refusal to answer questions was deliberate or intentional;

(b) that the matter under inquiry was within the committee's or subcommittee's delegated authority; or

(c) the nature of the question under inquiry to which the *ad hoc* questions are alleged to be pertinent.

7. The grand jurors who concurred in finding the indictment included eleven government employees and two housewives who might have been wives of government employees. The question presented is whether petitioner made a sufficient showing of bias on the part of these grand jurors to entitle him to a hearing on the issue.

Statute and Resolutions Involved

R.S. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, 2 U. S. C. 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 or less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Cong., 2d Sess., established the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and authorized that subcommittee to make a "study and investigation" of the following:

> "(1) The administration, operation and enforcement of the Internal Security Act of 1950;
>
> (2) The administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and
>
> (3) The extent, nature and effects of subversive activities in the United States; its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign

government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.'"*

Section 2 of the Resolution provides as follows:

"A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

Senate Resolution 180, 81st Cong., 2d Sess. amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

"3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

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* Also invoked by the indictment is Senate Resolution 58 (84th Cong., 1st Sess.) which repeats the language of Senate Resolution 366.

The new matter introduced by Resolution 180 is subparagraph (b).

Statement of the Case

1. The proceedings before the Subcommittee on Internal Security.

Petitioner, a practicing attorney for more than thirty years (R. 56), was subpoenaed on April 19, 1955, to appear before the Subcommittee on Internal Security of the Senate Judiciary Committee (hereinafter called the subcommittee) which, since February 21, 1955, had been conducting an investigation in connection with the recantation of the testimony of one Harvey Matusow. At the time of his appearance, petitioner was counsel for a group of defendants who had moved for a new trial after having been convicted in the United States District Court for the Southern District of New York for violation of the Smith Act. *United States* v. *Flynn*, 216 F. 2d 354, cert. denied 348 U. S. 909.

This motion for a new trial, based upon an affidavit of the witness Matusow recanting his original testimony in the case, had been filed for the defendants by their attorney of record, petitioner appearing as their counsel only after the motion had already been filed (R. 50). At the time of his appearance before the subcommittee, the motion for a new trial was still pending before Judge DIMOCK in the Southern District of New York (R. 46).*

The matter under inquiry by the subcommittee was expressly set forth by Senator Eastland, the chairman of the

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* Shortly after petitioner's appearance before the subcommittee, Judge DIMOCK granted the motion and ordered a new trial for certain of the defendants represented by petitioner. *United States* v. *Flynn*, 130 F. Supp. 412.

subcommittee, at the beginning of the investigation on February 21, 1955. Senator Eastland then stated that the witness Matusow had previously appeared before the same subcommittee and had given sworn testimony on the subjects of the Institute of Pacific Relations, "certain youth organizations", and the International Union of Mine, Mill and Smelter Workers. The chairman further recited that "Mr. Matusow has since made public statements recently to the effect that he lied when he testified before this subcommittee and on other occasions. The purpose of the hearing now commencing is to inquire into this whole matter" (R. 100).

The chairman concluded his statement concerning the purpose of the hearing as follows (R. 103):

> "The subcommittee in this series of hearings hopes to determine what is the truth. The subcommittee may be able to show, in some instances, what are lies. The subcommittee probably can and will try to make a record as to just what Mr. Matusow now says the truth is. The subcommittee also will seek to determine, from the testimony of this witness and others, all of the facts surrounding this case, and to make as complete a record of these facts as possible.
>
> "The subcommittee does not propose to be sidetracked into any examination or consideration of matters not involved with the testimony of Harvey Matusow, his public utterances, and the preparations and publication of the book soon to be published under his name".

Thus, when petitioner appeared on April 19, the subcommittee had authoritatively announced the nature and limitations of its investigation. At the time of petitioner's testimony, no new announcement was made that the subject matter of the investigation as previously defined had

been enlarged or altered (R. 40).* Petitioner was first asked in what way he had been "associated with the defence of Communist cases" for the purpose of identifying him "as of counsel in certain prominent cases which have involved leaders of the Communist Party" (R. 41-42). When petitioner, as a lawyer, protested questions about his professional practice, he was told by the chairman that "any questions which may be asked you regarding anything associated with the subversive elements in this country, if there are such, is a pertinent question, and it is pertinent to this inquiry" (R. 43).** Petitioner thereupon again appealed to the chairman to refrain from exacting disclosures which might compromise freedom of advocacy (R. 44). Upon being further informed that these questions were merely preliminary, he withdrew his objection and answered the questions.

Petitioner was then interrogated about a document which he had received from Matusow and which had been offered in evidence in support of the motion for a new trial (R. 45-46). After fruitlessly pointing out to the subcommittee the impropriety of calling upon him, as counsel in the case, to discuss matters which were then *sub judice* (R. 45-46), petitioner answered all questions concerning his activities in connection with the motion for a new trial and his relationships with the witness Matusow. He testified that he first met Matusow in a purely professional capacity *after* Matusow's recanting affidavit had been filed

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* At petitioner's hearing on April 19, 1955, only two members of the nine-man subcommittee, namely, Senators McClellan and Jenner, were present (R. 39-40). The transcript of petitioner's testimony before the subcommittee was introduced into evidence at the trial and appears at R. 40-59.

** This appears to be a capsule paraphrase of clause 3 of the basic resolution defining the subcommittee's jurisdiction (*supra*).

and two days before Matusow took the witness stand on the motion for a new trial.

He further testified that he had no knowledge of or any connection with Matusow's recantation of other testimony or with a book written by Matusow in which he discussed generally his career as a false witness. Petitioner also stated that he had not participated in the preparation of the motion for a new trial itself or in securing Matusow's affidavit which was attached to the motion for new trial and that he had only come into the proceedings as trial counsel after the motion had been filed and the matter set for hearing (R. 44-50).

After the completion of petitioner's testimony concerning the matter upon which he had been summoned, *i.e.*, the recantation of Matusow, the following questions were put to him which served as the basis for the contempt conviction below. The questions and petitioner's responses are set out below as they appear in the official transcript of the hearing before the subcommittee (R. 50-57):

> Mr. Sourwine. Mr. Sacher, have you ever served a prison sentence?
>
> Mr. Sacher. Mr. Chairman, is that question related to some legislative purpose? I wonder.
>
> Senator McClellan. The Chair will hear counsel. I was not just certain what the purpose of it was.
>
> Mr. Sourwine. Mr. Chairman, among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal courts. Among the suggestions for inclusion in such legislation is one which would prohibit members of the Communist Party from practicing in Federal courts. It is germane to the consideration of such legislation to inquire into the circumstances involving the prac-

tice of law in Federal court by persons who are Communists and by persons who are defending Communists. I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.

Mr. Sacher. I would like to be heard, Mr. Chairman, if I may.

Senator McClellan. The Chair thinks that you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth.

Mr. Sacher: Mr. Chairman, may I be heard, please?

Senator McClellan. Briefly.

Mr. Sacher. Mr. Chairman, my understanding, when I came here, was, as given to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation. I believe, and I say this with as much of a sense of responsibility as 30 years of practice at the bar have given me, that I have established rather conclusively by evidence other than Matusow's own recantation before Judge Dimock, that he lied and lied outrageously at the Flynn trial, and I should like the opportunity before I leave the stand today to file with your committee, Mr. Chairman, copies of the briefs that I filed with Judge Dimock and copies of some 13 exhibits that I prepared to demonstrate the falsity of Matusow's testimony at the Flynn trial.

The suggestion that my political beliefs or associations are to be inquired into seems to me to be diversionary in character. I maintain that Matusow lied and that, if this committee wants to know how our judicial procedures may be improved, let them wait until Judge Dimock passes judgment on everything that

transpired before him. Let there not be here made an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

Senator McClellan. That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Mr. Sourwine. Are you, Mr. Sacher, a member of the Communist Party, USA? [Count 1]

Mr. Sacher. Mr. Chairman, I have been called here because of my representation of the defendants in United States against Flynn on a motion for a new trial on the ground that Harvey Matusow committed perjury in their trial. I have answered and am prepared to answer all questions concerning my participation in that case. I refuse. I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the fifth amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me. And I therefore decline on the ground that I cannot with any regard for my own self-respect, do otherwise, Mr. Chairman.

Senator McClellan. Well, the Chair does not think that is is beneath the dignity of a good citizen of the United States to answer a question as to whether he is a member of an organization that seeks the overthrow of this Government by force and violence and

therefore, the Chair propounds to you now the question, Are you now a member of the Communist Party of the United States?

Mr. Sacher. Mr. Chairman, medieval inquisitors also thought there was no impropriety in asking those whom they regarded as heretics to answer the question.

Senator McClellan. The Chair does not care for a lecture. The Chair asked you a question.

Mr. Sacher. And I decline to answer that question, Mr. Chairman.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I decline to answer that question on the grounds I have already stated.

Senator McClellan. The Chair asks you another question. Have you ever been a member of the Communist Party of the United States? [Count 2]

Mr. Sacher. I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody's else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I respectfully decline to answer it.

Senator McClellan. The Chair asks you another question. Have you ever been a member of any organization, Communist Party or by any other name, that advocates and seeks the overthrow of the Government of the United States by force and violence?

Mr. Sacher. I will state to the Chair that I have never been a member of any organization which I believed to be a teacher or advocate of the forcible or

violent overthrow of the Government of the United States.

Senator McClellan. All right, you may proceed.

Mr. Sourwine. Have you ever served a prison sentence?

Mr. Sacher. I have, sir. I am sure that that will be most illuminating for the legislative purposes that the committee has in mind.

Mr. Sourwine. What was that sentence for?

Mr. Sacher. I was sentenced for contempt of court.

Mr. Sourwine. Have you ever been disbarred?

Mr. Sacher. No, sir.

Mr. Sourwine. Have you ever been ordered disbarred?

Mr. Sacher. An order was made but was reversed by the Supreme Court of the United States. You see, Mr. Chairman, counsel is not interested in eliciting the truth. He is interested in smearing me, and so although he knows that the Supreme Court of the United States reversed my disbarment, he asks me only whether I was disbarred, and I respectfully submit it is unworthy of the great functions of a Senate investigating committee to do that.

Senator McClellan. The Chair thinks you have a perfect right to make that explanation.

Mr. Sacher. I beg your pardon?

Senator McClellan. The Chair thinks you have a perfect right to make that explanation, sir.

Mr. Sacher. Thank you, Mr. Chairman. Thank you.

Senator McClellan. Proceed.

Mr. Sourwine. Did you, Mr. Sacher, ever attend a gathering of leaders of the Communist Party, U.S.A.?

Mr. Sacher. Well, I defended leaders of the Communist Party of the United States of America in United States against Dennis, and I imagine I must

have attended such meetings, certainly. That is what you do when you defend clients, Mr. Counsel. You meet with them occasionally.

Mr. Sourwine. Did you ever attend a gathering of leaders of the Communist Party who were not your clients?

Mr. Sacher. I am not aware of it.

Mr. Sourwine. Did you attend a birthday party of Alex Bittelman in January 1950?

Mr. Sacher. I do not remember.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman in January 1950 in the board room at the Communist headquarters on the ninth floor in New York?

Mr. Sacher. I don't remember. I should say to you, Mr. Counsel, that you are speaking of a period when the Dennis case was in full progress, and I cannot say whether I was in a building where a birthday party may or may not have been taking place at the time.

Mr. Sourwine. Did you attend a birthday party for Alex Bittleman at which Henry Winston proposed a toast, "Comrades, let's drink a toast to Alex"?

Mr. Sacher. I have no recollection of that.

Mr. Sourwine. Do you have any connection with the legal commission or law commission of the Communist Party?

Mr. Sacher. I do not know of any such organization so I cannot say anything about it.

Mr. Sourwine. Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.? [Count 3]

Mr. Sacher. Mr. Chairman, I have declined before and I decline again—

Senator McClellan. You are ordered to answer the question.

Mr. Sacher. On the grounds that I have already stated so I need not take the time of the committee, and I reemphasize that there is nothing in the purposes of the committee or the Congress, which comprehends the validity, the pertinence, or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

Senator McClellan. May I say to you I have great respect for the law profession. I have tried to practice a little law myself. But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and also the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it.

Mr. Sacher. Mr. Chairman, I respectfully say to that, without any desire to be immodest, I think that in the defense of those that have been charged under the Smith Act or under the Internal Security Act of 1950, I have acted in the best traditions of the profession by defending the rights of people to speak, to publish, to meet under the first amendment.

Senator McClellan. This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party.

Mr. Sacher. Mr. Chairman, for 30 years I have

practiced law in the State of New York and elsewhere in the United States, and I think again, without being subject to the charge of being immodest, that I have done a yeoman's share of the work that had to be done on behalf of the working men and women of our country. And I feel that my life is a living testimonial to what I am and to what I have done for my country, and I respectfully submit that it is a late time of the day for me to have to appear before anybody, after 30 years of honorable practice, to testify to my loyalty to the democratic institutions of the United States, and I unswervingly and unhesitatingly tell you my devotion is to the best interests of my country. And I believe I am serving those interests when I refuse to bend the knee to an inquiry concerning my innermost thoughts and beliefs, whether they be on politics, religion or anything else. My conscience dictates to me that I shall not, under compulsion answer today any more than John Freeborn Lilliburne answered in the 1640's to the Court of Star Chamber and on the same grounds, Mr. Chairman, on the grounds that it is incompatible with the dignity of the individuals to make compulsory disclosure of his thoughts and his ideas and his beliefs, I must respectfully decline to answer that question.

Senator McClellan. You have a right to decline, of course, if you wish to invoke your constitutional privilege

Mr. Sacher. I am invoking my rights as a man and my dignity as a man and I am not invoking any privileges against self incrimination. I have never done anything and I pledge you, Mr. Chairman, I shall never do anything which, so far as I can help, will expose me to any criminal charges.

And I say to you that I speak not from fear of incrimination or prosecution. I speak only from the

dictates of conscience. And I ask all Americans to join me in resisting inquiries of this kind, for when the day comes when Americans will resist inquiries of this kind, we shall once again witness a restoration of those liberties which we so long enjoyed prior to the advent of the suppression of them.

Senator McClellan. Now you have made your speech. You are ordered to answer the question.

Mr. Sacher. I respectfully decline, Mr. Chairman.

Senator McClellan. All right, proceed, Mr. Counsel.

Mr. Sourwine. Mr. Chairman, may I ask that the witness be ordered to answer that question?

Senator McClellan. I ordered the witness to answer the question. He declined. The record so shows. Proceed.

It will be noted that petitioner declined to make the disclosures involved here solely on the grounds that they were not pertinent and that they invaded an area protected by the First Amendment. Most important is the fact that petitioner declined to make these disclosures only after it was made clear to him that the purpose of the interrogation into his political views and associations was solely and exclusively to aid the consideration of legislation barring Communists from the practice of law in the Federal courts (R. 50). No attempt was made to justify the pertinence of the questions to the announced subject under inquiry. In fact, petitioner's objection to the new line of questioning* was met not by a claim that it was linked to the Matusow recantation but that it was germane to a subject matter entirely different from that then under inquiry.**

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* We refer to the series of questions beginning with (R. 50), "Mr. Sacher, have you ever served a prison sentence?"

** Indeed, the questions here in issue were specifically asked in response to the direction of the chairman to "lay a foundation" for an exploration of this newly-advanced subject matter dealing with political qualifications for practicing law in the Federal courts.

2. The proceedings below.

Petitioner was indicted on a three-count indictment for refusal to answer the following three questions put to him by the subcommittee: (1) "Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?"; (2) "Have you ever been a member of the Communist Party of the United States?"; (3) "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.?" (R. 2-3).

Prior to the opening of the trial, petitioner moved to dismiss the indictment on the broad ground that it failed to allege an offense against the United States (R. 3). Petitioner also moved for a bill of particulars (R. 4) setting forth the matter under inquiry as to which each of the three questions was allegedly pertinent, the manner in which each of the questions was claimed to be pertinent to such matter under inquiry and the legislative purpose of the matter under inquiry. Further, a motion was filed, accompanied by an offer of proof, challenging the qualifications of government employees to sit on the grand jury and requesting a hearing to establish the bias of such grand jurors (R. 4-9). The motions were denied (R. 9).

At the trial, the sole witness presented by the government to establish the pertinency of the questions to the subcommittee's inquiry was Mr. Sourwine, counsel for the subcommittee. Asked to identify the subject under inquiry at the time that petitioner was called, he stated (R. 11), "The committee was engaged in its continuing investigation into the scope, the extent, and the effect of subversive activity in the United States".* In support of the thesis

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* The equating of the subject matter of the committee's investigation with its general jurisdiction as set forth in clause three of its basic resolution is further seen by the witness' testimony (R. 12):

"The committee had testimony in its record dating back from 1952 with respect to activity of Mr. Sacher bearing on the subject of the committee's inquiry, that is, subversive activity."

that the questions involved here were rendered pertinent by the subcommittee's continuing at-large investigation into "subversive activity," this witness testified that the subcommittee hoped to secure testimony from petitioner concerning his alleged subversive activity in the following areas:

The subcommittee had information that a record containing a cross-examination by petitioner of Louis Budenz, a Government informer, had come into the possession of the attorneys for Owen Lattimore (R. 13, 15, 24). An attorney named Fanelli had testified before the subcommittee in 1952 that he had supplied this document to counsel for Mr. Lattimore. Mr. Sourwine testified that the subcommittee sought to learn whether (R. 24) "Mr. Fanelli's version of how Mr. Lattimore got the document * * * or whether the belief of the committee that it had been given by Mr. Sacher" was true. This, according to the testimony, was a most pressing reason for calling petitioner. Yet he was asked nothing at all about this matter.*

The second matter about which the subcommittee purportedly wanted to ask petitioner was his alleged presence at a birthday party for one Alexander Bittelman at which high functionaries of the Communist Party were said to have been present (R. 25).** A third subject which allegedly gave pertinency to the questions which petitioner de-

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* This matter was probed by the subcommittee at some length in its hearings on the Institute of Pacific Relations in 1952, but petitioner was not subpoenaed in connection with those hearings (R. 64).

** Petitioner was asked at the hearing about his presence at this affair and responded that he had no recollection of it (R. 54-55).

clined to answer was his claimed connection with a number of organizations.*

Curiously enough, petitioner was not questioned concerning his relationships to these organizations, nor was he asked about a fourth accusation, namely, that he participated as a pallbearer at the funeral of one Joseph Brodsky, who assertedly was "a well known Communist" (R. 28).

The remainder of Mr. Sourwine's testimony (R. 29-40) deals with information allegedly in the subcommittee's files concerning the Matusow recantation. According to this testimony, the subcommittee had established, prior to calling petitioner, that a plan for obtaining a recanting affidavit from Matusow had been conceived by two other lawyers (R. 30; G.E. 12, R. 94), who were counsel in another case in which Matusow had testified, *Jencks* v. *United States*, 226 F. 2d 553 (C. A. 5), reversed 353 U. S. 657. Mr. Sourwine testified that the subcommittee had established that as a means of obtaining an affidavit from Matusow in the *Jencks* case (R. 30), the two attorneys decided to get him to write a book which would be financed by a labor organization. The subcommittee assertedly was pursuing the hypothesis that the compensation for the book was a way of paying for the affidavit (R. 34). But it had no information that petitioner was involved in the transfer of funds to Matusow and indeed knew that he had no

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* Those enumerated by Mr. Sourwine included the following (R. 25-28): American League for Peace and Democracy, International Labor Defense, Civil Rights Congress, Jefferson School of Social Science, Lawyers Committee on American Relations with Spain, National Council of Arts, Sciences and Professions, National Lawyers Guild, School for Democracy, Workers School, Painters Committee for the Defense of Louis Weinstock, and the Connecticut Committee to Aid the Victims of the Smith Act.

part in the payment for Matusow's book (R. 34-35). Although the subcommittee concededly knew that petitioner had nothing to do with the book or its financing, Mr. Sourwine testified that the subcommittee nevertheless was interested in what petitioner knew about "the whole scheme" and to what extent he "participated in the planning for the strategy of it" (R. 35).

The suspicion, inspired by the manner in which the testimony was elicited,* that the justification for the pertinence of the question was an afterthought is well-grounded in the simple circumstance that petitioner was not asked a single question at the hearing either about the book or about its financing.

In the same way, when first asked what information the subcommittee possessed concerning petitioner's connection with an alleged conspiracy to discredit Government witnesses and to secure new trials for convicted Communists, Mr. Sourwine replied (R. 31), "The only connection that the committee had information of in its files at that time was that Mr. Sacher had received the affidavit and certain other papers from Mr. Matusow" for use in seeking a new trial in the *Flynn* case.

Again it apparently became necessary to qualify this unequivocal answer. Pressed further about the connection of petitioner to Matusow's recantation, Mr. Sourwine testified (R. 33, 36) that the subcommittee had information that the Matusow recantation and the writing of the book, as well as the "whole drive" to discredit government wit-

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* Mr. Sourwine originally stated (*supra*) that the subcommittee knew that petitioner had nothing at all to do with the financing of the book. The "scheme" or "plot" theory was advanced when the witness was pressed (R. 35) to qualify his original unequivocal answers.

nesses, including "the coining of the phrase 'informer'," were all planned by a group of lawyers in the Communist Party, of which petitioner was one.

But, as we have seen, the pertinency of the questions here in issue was justified at the hearing on a wholly different basis,* namely, on the basis of proposed legislative restrictions upon the practice by Communist lawyers in the Federal courts (R. 37-38).

The case was tried before Judge HOLTZOFF without a jury. The trial court found petitioner guilty on all three counts (R. 10; 139 F. Supp. 855) and sentenced him to imprisonment for six months and a $1,000 fine (R. 10). The lower court affirmed. In contrast to the trial court which had justified the pertinency of the questions on the ground that they fell within the subcommittee's general jurisdic-

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* In addition to the fact that the "conspiracy" theory was not mentioned at the hearing and that the testimony about it at the trial was vague and contradictory, the report of the subcommittee (G. E. 12), which covers some 110 pages and contains detailed findings on the recantation, does not connect petitioner with Matusow aside from his participation as counsel in the *Flynn* case. Nor is this pertinency rationale fortified by Mr. Sourwine's testimony at the trial concerning the information in the possession of the subcommittee on the alleged conspiracy. The following is all the evidence in the record dealing with the existence of this "conspiracy":

The subcommittee assertedly had information that petitioner occupied offices in the same suite as the author of an article which appeared in *The Nation*, attacking the credibility of informers (R. 34); that in 1947 petitioner had attended a meeting at the home of one of the publishers of the Matusow book which was also attended by a Communist section leader (R. 36); that the affidavit had been notarized by an attorney who had been associated with petitioner in the *Flynn* case and typed by that attorney's wife after having been dictated in substantial part by another attorney who was also a lawyer in the *Flynn* case (R. 37).

tion (139 F. Supp. at 859-860), the court below found that the "conspiracy" theory brought these questions within the announced subject matter of the inquiry (240 F. 2d at 53). Beyond stating that there was no "abandonment" of the Matusow inquiry by the references to standards governing Federal law practice, it wholly failed to deal with the contention that this was the exclusive justification advanced to petitioner when he challenged the pertinency of the questions in issue. This ruling made it unnecessary for the court to reach our contention that there was no power in the subcommittee to initiate an inquiry into a new and unrelated subject matter. The court also upheld the validity of the indictment and of the subcommittee's basic resolution.

A petition to review the decision below was granted by the Court "and the case was remanded for consideration in light of *Watkins* v. *United States*, 354 U. S. 178." 354 U. S. 930.

The court below, sitting *en banc*, reaffirmed petitioner's conviction, four judges dissenting (Appendix B). One dissent was written by Judge FAHY on behalf of himself, Chief Judge EDGERTON and Judge BAZELON. A separate dissent was filed by Judge WASHINGTON, one of the members of the three-judge panel which had originally affirmed the conviction.

Reasons for Granting the Writ

I. Neither the Senate Resolution under which the inquiry was conducted, nor the statements of the subcommittee Chairman, made the pertinence of the questions sufficiently clear to meet the requirements of the due process clause.

Petitioner's conviction was improper because the pertinency of the questions to the matter under inquiry was not communicated to him with the explicitness and clarity required by the due process clause of the Constitution. *Watkins* v. *United States*, 354 U. S. 208, at 209. Intervention is required by this Court not merely because its express mandate to consider this case in the light of *Watkins* (354 U. S. 930) was ignored. By reducing the requirement of "indisputable clarity" in the communication of the reasons for pertinence to an empty verbalism and by continuing, as in the past, to disregard the special demands for precision made by restraints upon First Amendment rights, the court below has created a grave impasse in the administration of the contempt statute. Compare *Barenblatt* v. *United States*, No. 787 this Term. Unless this *en banc* decision of the court, which of all the courts in the country is most frequently called upon to review contempt of Congress cases, is reversed the constitutional rights of witnesses before Congressional committees will be lost.*

A. *Resolution 366*

In *Watkins* v. *United States, supra*, the Court, in construing House Resolution 5 creating the House Un-Ameri-

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* In some nine cases, under Title 2, U.S.C., Section 192, now pending in the court below, motions to defer further proceedings pending the disposition of this case and *Barenblatt* v. *United States, supra*, were denied on February 14, 1958.

can Activities Committee, found that the boundless scope of the resolution made it easy for the committee to engage in investigations totally beyond its legislative jurisdiction and difficult for witnesses to resist compulsory disclosures outside the legislative sphere. This fundamental defect in the resolution in turn made it impossible for the committee internally to confine its inquiries to legislative subjects and burdensome for the witness to ascertain whether a particular question is or is not "pertinent to the matter under inquiry." 2 U.S.C. 192; 354 U. S. at 206-209.

The latter problem of statutory jurisdiction, the Court pointed out, has constitutional dimension. Since pertinency to the matter under inquiry is "part of the standard of criminality" under Section 192, the due process clause of the Constitution requires that it be free of "the vice of vagueness."

The court below, in order to save the resolution involved here from the same condemnation which the Court in the *Watkins* case directed against the resolution creating the House Committee on Un-American Activities, found that the Matusow investigation was conducted under clause 1 and clause 2 of the Senate Resolution 366 (but presumably not clause 3). But the court ignored the fact that the investigation obviously had no relation to the administration, operation and enforcement of either the Internal Security Act of 1950 or any other law. Indeed, the court turned its back on the subcommittee statements which reflect its own conception of the portion of the resolution authorizing the inquiry. On no less than three occasions (R. 43, 52, 56) the subcommittee chairman equated its authority to conduct with the final catch-all clause of the resolution, "The extent, nature and effects of subversive activities in the United States." The government at the trial relied on the same vague clause (*supra*, pp. 19-20). The clauses upon which the court below relied were not

mentioned at all, either in the hearing or at the trial. Indeed, neither the trial judge nor the panel of the court below which decided this case prior to *Watkins* relied upon these clauses in upholding petitioner's conviction. In this Court, on petition for certiorari, the Solicitor General in his memorandum in opposition did not argue that these clauses were relevant.

In the light of all this, a claim that the resolution clarified the pertinency of the questions would be absurd. And it can hardly be disputed that clause 3 of the Resolution which is relevant here is subject to the very same defects as those which were emphasized by the Court in *Watkins*.*

B. *The statements at the hearing.*

As we have seen (*supra*, p. 8), at the commencement of the investigation on February 21, 1955, the chairman of the subcommittee stated that the inquiry would be limited to that subject and that when the hearings began on February 21, 1955, the scope of the investigation or the "question under inquiry" was confined by the Chairman of the subcommittee to the truth or falsity of testimony given by Harvey Matusow before the subcommittee and elsewhere, and the circumstances leading to Matusow's recantation of such testimony.

When petitioner protested the pertinency of the questions involved here, both on the ground of the First Amend-

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* A well-reasoned opinion by Judge YOUNGDAHL in *United States* v. *Peck*, 154 F. Supp. 603, concludes that none of the clauses of Senate Resolution 366 in any way redeems it from the vice of vagueness, and that the evils which flow from the application of House Resolution 5 are equally characteristic of the application of Senate Resolution 366.

ment, as well as lack of pertinency, the only explanations which he received dealt with a claimed concern of the subcommittee with the violent overthrow of the government (R. 52) and with "national security" (R. 55).

After the witness was questioned in detail about his relationship to Matusow and answered all questions put to him concerning this subject, he was asked a new kind of question, namely, whether he had ever served a prison sentence. When the witness challenged the pertinence of this question, the Chairman, a skilled and experienced investigator, apparently shared petitioner's doubt as to pertinence (R. 50): "The chair will hear counsel. I was not just certain what the purpose of it was." Petitioner was then informed by the committee counsel that these questions were germane to a measure under consideration by the subcommittee barring Communists from practice in the Federal courts (R. 50-51). The Chairman instructed committee counsel that the proper way to "lay a foundation" for an interrogation into the new subject of the qualifications of Communist lawyers was not by initially asking the witness whether he had ever served a prison sentence, but "first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51). When the witness continued to protest the pertinency of these proposed questions on the ground that they were diversionary and a departure from the subject of Matusow, the subcommittee Chairman persisted in his instruction to counsel that he "ask the proper questions to lay a foundation for this" (R. 52).

In short, the subcommitte did not merely fail to enlighten the petitioner as to how the Matusow recantation justified the new line of questioning, but rather affirmatively told

him that an altogether different subject made the questions germane.*

C. *The decisional grounds below.*

The court below found (App. B) that the questions in issue were intended to be pertinent to the Matusow inquiry; that petitioner should have known that they were so intended, and that in fact he actually knew the reasons for the pertinency of the questions to the Matusow inquiry. The court apparently adopted the view that the questions which the witness refused to answer were so inherently linked to the subject under inquiry as to require no explanation upon an objection of non-pertinency. The court, however, nowhere explained why the content of these questions made their relationship to the Matusow inquiry "indisputably clear" to the witness. Moreover, its entire discussion of this question is marked by a curious failure to deal with the fact that the subcommittee chairman's only responses to the objections to pertinency failed, as we have seen (*supra*, p. 28), to link these questions to the subject of the Matusow investigation.**

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* In our original petition in No. 884, we argued at some length (pp. 37-40), that the two members of the subcommittee present at the time of petitioner's appearances did not possess the authority to change the subject matter under inquiry from Matusow's credibility to the qualifications of lawyers to practice. Neither the government nor the court below has ever challenged this contention, which is adequately summarized in Judge FAHY's dissent (App. B, p. 17, fn. 1). It follows, therefore, that the pertinency of the questions to this new unauthorized subject matter could not justify petitioner's conviction.

** Throughout its discussion of the issues, the court consistently ignored the statements of the subcommittee itself as to its grounds for proceedings. Although the court has no other occasions (e.g. *Watkins* v. *United States*, 233 F. 2d 681) stressed the great deference which courts must accord subcommittee statements of investigative purpose, in this case it preferred to disregard this caution and substitute its own judgment for the subcommittee's both as to why petitioner was required to answer the questions and as to the source of the delegated power to conduct the investigation see *supra*, p. 26.

But the court below could not similarly ignore the subcommittee's abandonment of the Matusow inquiry. So this barrier to conviction was removed by the thesis that the subject of qualifications for lawyers constituted a brief digression or excursion which was terminated prior to the interrogation of the witness about his Communist affiliations. The court found that, "as with almost any examination of a witness" * the entire interrogation of petitioner was bound together by a "main thread" (App. B, p. 6) from which there was a digression.

But this limited digression theory simply cannot be reconciled with the structure and content of the examination. Prior to the question whether the witness had ever served a prison sentence, the interrogation dealt specifically and exhaustively with his relationship to Matusow (R. 40-50). The question about a prison sentence marked a sharp cleavage in his interrogation and all the questions which followed dealt, as we have seen (*supra*, pp. 12-15), exclusively with the witness's personal background, his private life and his alleged Communist affiliations. Moreover, the theory of a one-question digression is defeated by the fact that long after the alleged termination of the claimed digression the witness was again asked whether he had ever served a prison sentence (*supra*, p. 14) and by the failure of the subcommittee to tell the witness upon objection that the questions were linked not to the qualifications of lawyers to practice but to the Matusow recantation.

Petitioner's protest against the first prison sentence question concludes (R. 51-52):

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* We had always thought that the most common characteristic of the examination of a witness is not that it hops back and forth from its main line, but rather that it exhausts one subject and then proceeds to another.

"Let there not be here made an attempt to prejudice the determination not only by Judge DIMOCK, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now, I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice."

The Chairman responded (*ibid.*);

"That is what we are trying to find out. Now let us proceed, Mr, Counsel, and ask the proper questions to lay the foundation for this."

The court below found that this colloquy "conclusively shows that as a result of objections from appellant, the digression or 'excursion' was promptly terminated * * *" (App. B, p. 7).

Apart from the fact that, as we have seen (*supra*, pp. 12-15), the record objectively shows a complete abandonment of the Matusow subject, the court's textual reading of the colloquy is tortured. By italicizing the spoken words "that" and "this", the court could hardly alter the rules of grammar, endow these pronouns with a demonstrative rather than an indefinite denotation and assign them the antecedent, "whether or not Matusow lied when he testified at the Flynn trial." * These words do not acquiesce in petitioner's objection but reject it by establishing continuity

* Besides, if these words were used demonstratively, it is arbitrary to relate them selectively to the antecedent phrase about Matusow's having lied at the Flynn trial and to overleap the last sentence about a "disservice to the administration of justice." This is especially true since the subject of the inquiry was not primarily whether Matusow had lied at the Flynn trial—but rather his recantation of his testimony before the subcommittee (*supra*, p. 8). The Chairman had expressly disavowed a purpose to retry the *Flynn* case (R. 47).

with the Chairman's previous instruction to counsel to "lay the foundation for that" *i.e.*, the subject of qualifications to practice. As Judge FAHY's dissent points out (App. B, p. 19), "it seems reasonably clear the Chairman at that point was not returning to the Matusow subject but was repeating in substance what he had said with regard to the digression from that subject," namely, that a foundation should be laid with respect to the subject of practice in the Federal courts, not Matusow.

Further, the intention to explore a new subject-matter is plain from the instruction to the subcommittee counsel to "ask the proper questions to lay the foundation for this." The Chairman originally thought that asking the witness whether he had ever served a prison sentence was not a proper way to launch an interrogation into the new subject of qualifications for lawyers. Before asking such a question counsel was instructed to ask "first about membership in the Communist Party." As soon as petitioner had completed his protest, counsel was not instructed to desist from pursuit of this alien subject but, again, to explore it in a more orderly way by asking "proper questions," *i. e.*, questions dealing with Communist Party affiliation. An instruction to ask "proper questions" was hardly necessary to continue an inquiry which, as the court below observed (App. B, p. 6) had already consumed eighteen transcript pages. And, for that matter what need would there have been for the laying of a foundation for further inquiry into a subject matter which the committee had already explored for eighteen pages?

The "conclusive" significance of the colloquy in issue as evidence of the continuity of the investigative purpose of the subcommittee has never before occurred to anyone in the course of this case. It was not relied on either by the government (R. 11-64) or the trial court (R. 64-74) at the trial of the case. The first decision below (240 F. 2d 46)

makes no reference to it. The government's memorandum in opposition in No. 884, likewise fails to refer to it either in its statement of facts* or in its argument.** And it was not even mentioned in the government's supplemental brief on remand before the court below. The short of the matter is that the court below has stood the record on its head in an effort to transform evidence which establishes an abandonment of the Matusow inquiry into its opposite.

The court below relied upon three contentions in addition to its "*this*" and "*that*" thesis. It urged (App. B, p. 14) that the questions in issue were pertinent because they were properly part of petitioner's cross-examination.

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* The government's memorandum in opposition thus summarized the record insofar as it relates to the question here in issue (pp. 10-11):

> "The chairman told counsel he 'should lay a foundation for that first by asking the witness if he is a member of the Communist Party' (R. 51). Following a protest by petitioner that such an inquiry into his 'political beliefs or associations' seems to him to be 'diversionary in character' (*ibid.*), he was nevertheless asked, and refused to answer, whether he then was or ever had been a member of the Communist Party (R. 52-53)—these being the questions on which counts 1 and 2 of the indictment are based (*supra*, p. 5). At that time he specifically disclaimed reliance on the Fifth Amendment.
>
> "The committee counsel thereupon once again asked petitioner whether he had 'ever served a prison sentence' (R. 53), petitioner replying on this occasion that he had—a sentence for contempt of court (*ibid.*)."

** The government argued (Opp. p. 15) that the "committee's digression certainly ended when petitioner was asked for the second time (and he this time answered) the question whether he had ever served a prison sentence." But this effort to save the count-three question which was asked after the second question about a prison sentence is plainly unsupportable. And *Watkins* would in any event invalidate this contention, for it is simply impossible to argue that the pertinency of the question was made undisputably clear to petitioner.

The court relied upon a statement early in the hearings by the Chairman that the witness was subject to cross-examination. But as the dissenting opinion points out (App. B, pp. 22, fn. 13), this statement "preceded the digression with respect to practice in federal courts and did not prevent that digression from occurring". The court further insisted (App. B, pp. 14-15) that the witness would not have answered the questions even if he had been told by the subcommittee why they were germane to the Matusow investigation. But we do not understand the law to be that the right to due process in a criminal case turns upon an appellate court's speculations as to whether a defendant would have been helped by affording it to him.

Finally, the court wholly abandoned the record to speculate that petitioner's experience as a lawyer supports the reasonableness of charging him with an awareness of the pertinency of the questions to the Matusow inquiry (App. B, p. 14). We hardly think that due process of law turns upon such essentially treacherous forms of proof as a defendant's imputed occupational or professional experience. In any event, it seems to us that the contrary of the court's inference is more reasonable. An experienced lawyer could be expected to know only that when a committee chairman changes the subject matter of an inquiry, the witness has a right to rely upon his statement to that effect; that after a hearing has been conducted for a considerable period of time, it is unnecessary to lay a foundation for its continuance; that the purpose of objections to the pertinency of a question is to obtain an explanation linking it to the subject matter under inquiry and that when the committee Chairman offers an explanation which supplies no such link, it is safe to assume that no such link is intended, and that an interrogator is not required to lay a foundation for initiating the cross-examination of a witness.

It was the vagueness of the standard of pertinence which condemned the conviction in the *Watkins* case. Here vague-

ness is dwarfed by confusion. For the subcommittee told the witness that it intended that a subject other than the only one which can sustain petitioner's conviction was a justification for pertinence. The decision below thus transforms the congressional hearing into a contempt trap in which the witness may be ambushed, not merely because he is forced to grope in the dark, but because he is naive enough in making his responses to rely upon what he is told about the subject under inquiry.

D. *Pertinency could not be established at the trial by testimony concerning matters not disclosed to the witness at the hearing.*

Despite the fact that the basic resolution creating the subcommittee is inadequate to endow the questions involved here with pertinency under the statute, the government and the trial court relied upon it for this purpose. The government introduced at the trial a variety of matters which, it was claimed, showed that the witness had engaged in "subversive activity" (R. 70-72; 139 F. Supp. at 860). Obviously, the government could not belatedly make a suspicion that petitioner was "subversive" the justification for calling him and asking the *ad hoc* questions involved here, in the face of the explicit statement to the witness at the hearing concerning the reasons why he was asked these questions.* And it was a denial of petitioner's right to

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* A trial of petitioner's past life and political associations was the government's only alternative after it had disregarded the reasons for the interrogation communicated at the hearing. The "subversive activity" theory which was used to justify pertinency at the trial, suggests that the prosecution felt it necessary to begin all over again on a new theory because pertinency could not be justified upon the basis of the record of the hearing itself. This suspicion is fortified by the fact that the subcommittee did not, with a single exception (R. 25, 54-55), address any questions to petitioner at the hearing concerning the sundry matters which Mr. Sourwine testified were of interest to the subcommittee and constituted a reason for calling him.

due process for the trial judge not only to admit this evidence but to find pertinency on the basis of it (*supra*, pp. 19-23).*

II. Senate Resolution 366 did not authorize the Internal Security Subcommittee to require answers to questions such as those put to petitioner.

It is hardly open to question that interrogation of the kind involved here threatens First Amendment rights. *Watkins* v. *United States, supra; Sweezy* v. *New Hampshire*, 354 U. S. 234, 350; *Koenigsberg* v. *State Bar Association of California*, 353 U. S. 252, 261; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 392. The Court recognized unequivocally in *Watkins* that the compulsory disclosures involved there impair the freedom of the witness, of those he is forced to identify and of large groups who, though not direct victims of legislative abuse, are intimidated into silence. The problems for the Congress, the committee, the witness and the courts which result from the illimitable scope of the resolution, the looseness of its delegation, the absence of clear legislative justification as a foundation for jurisdictional pertinency and as a control over statutory pertinency, all were rendered insuperable, the Court ruled, primarily because of the special claims of the protected freedoms.

The Court ruled in *Watkins* that "when First Amendment rights are threatened, the delegation of power to the

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* The injury to petitioner was compounded by the trial court's denial of a motion for a bill particularizing the matter under inquiry and the reasons for the pertinency of the questions (R. 4). The motion was denied on the ground that the material sought was available in the printed record of the hearing (R. 79-80). The court then justified the pertinency of the conviction on the basis not of the hearings but of matters undisclosed to the witness and recited at the trial by the subcommittee counsel.

committee must be clearly revealed in its charter." 354 U. S. at 208-209, 217.* As we have already shown, the portion of the Resolution which is invoked by the indictment in this case shares all of the vagueness of House Resolution 5. The unparticularized language of the Resolution must, therefore, be construed so as to exclude the authority to compel compulsory disclosures of the kind involved here. See *United States* v. *Rumely*, 345 U. S. 41, 45-47.

III. If Senate Resolution 366 is authorized to require answers to questions such as those put to petitioner, it is unconstitutional.

In *United States* v. *Peck, supra,* the court found that Resolution 366 when construed to authorize compulsory disclosures of the sort involved here, violates basic freedoms. The court thus stated, *supra,* at 609:

> "In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. The Senate did explicitly state, however, that the investigation was not limited to 'movement(s) seeking to overthrow the Government of the United States by force and violence.' But no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition. What may be a fit subject of investigation one day may be tomorrow's sacred cow. What is the height of orthodoxy today

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* As Judge WASHINGTON pointed out in his dissenting opinion (App. B, p. 23):

> "I think one of the main thrusts of *Watkins* was this: that the courts should not sanction the criminal conviction of a person who refuses to answer questions which would touch upon First Amendment rights * * *, unless there is shown clear legislative authority, within the framework of the constitutional responsibilities of the Congress."

may be viewed as 'un-American' tomorrow. Nor is there any individual who can be certain that he is not considered 'subversive' by some of his fellow citizens. Who is to say, for example, whether one who is openly dedicated to depriving his neighbors of their 14th Amendment rights under the Federal Constitution is a 'subversive'? The dangers of classifying certain forms of belief or political activities as 'subversive' are all too apparent from the recent history of this country. It is too easy for one segment of public opinion to smear with that label those who hold opinions which are unpopular. Such labeling by means of legislative investigations constitutes a drastic form of Governmental sanction. When that labeling is done in the manner utilized by the Senate Internal Security Subcommittee it becomes intolerable. Democracy deals unpopular views by offering better ideas and programs, not by outlawing those views or penalizing their adherents.

* * *

"* * * A comparison of the Subcommittee's reports with those of the Un-American Activities Committee demonstrates an identity of understanding as to the sweeping mission to be accomplished. Each conceived of itself as the nation's watchdog. Each thought that it was capable of determining what was 'Un-American', what was 'subversive'. Each failed to distinguish between innocent associations with groups which were legitimate at the time of membership and knowing adherence to a criminal conspiracy."

In *United States* v. *Rumely, supra,* the court pointed out that where First Amendment rights are involved, the courts will "construe narrowly the resolution describing the committee's authority." Only an interpretation of the Resolu-

tion which would exclude the power to ask the questions here in issue could avoid a serious constitutional conflict.

IV. The subcommittee was not authorized by the full committee to conduct the inquiry or to require answers to the questions in issue.

In *Watkins,* it was at least clear that the whole range of Committee power was delegated to the subcommittee. Here there is nothing in the record to show the nature and scope of the delegation to the subcommittee. All that appears (R. 82-83) is that at some time prior to 1955 there had been some sort of delegation, but its nature and scope are completely obscure. The government thus has totally failed to sustain its burden of proving the authority in the subcommittee to conduct the inquiry here in issue.

V. The insufficiency of the indictment.

The indictment (R. 2-3), alleges that petitioner had "unlawfully refused" to answer the questions put to him. It contains no allegation that these refusals were wilful or deliberate or intentional. Moreover, it contains nothing more than a reference to the legislative authority for the subcommittee's hearing and a naked allegation that certain questions put to petitioner were pertinent to an unspecified "question then under inquiry". The indictment is accordingly insufficient and should have been dismissed because it fails to allege and specify (a) that the "question then under inquiry" was within the scope of authority delegated to the committee by Congress and to the subcommittee by the committee; (b) the nature of the "question then under inquiry" to which questions put to petitioner are said to have been pertinent; and (c) that the refusal to answer was deliberate or intentional.

Indictments substantially identical to that involved here have been dismissed by the Court of Appeals for

the Second Circuit for failure to specify the above three essential elements of the offense. *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2).* There is thus raised a conflict in the circuits with respect to an important question in the administration of Section 192, which apart from all other considerations warrants review here. Since the decision in *Lamont*, the government has brought indictments under Section 192 in three cases in the Second Circuit. These indictments, involving the Committee on Un-American Activities, contain specific allegations with respect to the source of authority for the particular investigation, the nature of the matter under inquiry, and the fact that the defendant "deliberately and intentionally" refused to answer.**

A. *The failure to allege that the question under inquiry was within the subcommittee's delegated authority.*

The opening paragraph of the indictment lists four sources of authority for the hearing held by the subcommittee. Two of these, however, must be discarded as irrelevant. Section 102 (1) (k) of the Legislative Reorganization Act of 1946 (P.L. 601, c. 753, 60 Stat. 818) merely prescribes the number of members of the Senate Committee on the Judiciary, and directs that all bills, resolutions, and other legislative matters relating to eighteen listed topics (e.g. "Judicial proceedings, civil and criminal, generally" and "civil liberties") shall be referred to the committee. Neither here nor in the Standing

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* The government has not sought review of the Court of Appeals decision affirming Judge WEINFELD's decision dismissing the indictments. 18 F.R.D. 27 (D. C. N. Y.).

** These cases are *United States* v. *Seeger*, No. C-152-240; *United States* v. *Yarus*, No. C-152-239, and *United States* v. *Sullivan*, No. C-152-238.

Rules of the Senate, wherein Rule XXV (k) simply duplicates Section 102 (1) (k),* is any authority delegated to the committee to conduct investigations, issue subpoenas, or exercise compulsory testimonial power.

There is, however, another provision of the Legislative Reorganization Act of 1946—Section 134(a), not mentioned in the indictment—which does authorize "each standing committee of the Senate, including any subcommittee" to conduct investigations, issue subpoenas, and require the attendance of witnesses and the production of documents. It is from this provision that the committee derives its compulsory testimonial authority, and it is Senate Resolutions 366 (81st Cong., 2d Sess.) and 58 (84th Cong., 1st Sess.), referred to in the indictment, and set out *supra,* p. — which prescribe the scope of that authority.

It is within the meaning of this language that the authority for the inquiry must be found. Conceivably, the matter under inquiry before ths subcommittee on April 19, 1955, might have been within the scope of that authority. But the indictment does not so allege. Nor does it allege any source of authority in the subcommittee to conduct any inquiry whatsoever. For these reasons, the indictment is fatally defective. On these very grounds, indictments that were identical in all relevant respects were dismissed in *United States* v. *Lamont, supra,* and *United States* v. *Metcalf, unreported* (Crim. No. 3052, S. D. Ohio W. D. 1955). In *Watkins* the Court was quite specific in its insistence that committees engaged in inquiries of the sort involved here must be "restricted to the missions delegated to them." 354 U. S. at 206. The

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* The Standing Rules are reproduced in *Senate Manual,* S. Doc. 9 (84th Cong., 1st sess.), and Rule XXV(k) appears at pp. 37-38 thereof.

requirement that the source of investigative authority be made explicit is not a causal or optional one, but rather essential to judicial determination that a legislative need was felt for the information denied by the witness to the committee. It should thus have been incorporated in the indictment for the guidance not only of the defendant but of the trial court.

B. *The failure to specify the matter under inquiry to which the questions put to petitioner are said to be pertinent.*

Unless the questions which petitioner declined to answer were pertinent to a matter which the subcommittee, duly authorized, was inquiring into at the time, he has committed no offense. The indictment charges that the questions were "pertinent", but it does not state to what matter they were pertinent. The allegation that the questions put to petitioner were pertinent "to the question then under inquiry", without any description of the latter, is meaningless, and fails to satisfy the well-recognized requirement that an indictment under 2 U.S.C. 192 must plead pertinency as an essential element of the offense. *Sinclair* v. *United States*, 279 U. S. 263.

The Court in *Watkins* ruled that the elucidation of pertinency to the witness at the hearing is an indispensable due process requirement. We think the same reasoning applies to an indictment under the contempt statute. Indeed, the manner in which the government and the court have played "hide-and-go-seek" with the matter under inquiry in this case strongly suggests that the government has resorted to a vague and loosely drawn accusation because a properly-drawn indictment would at once disclose that the questions

put to petitioner were not pertinent to the matter then under inquiry.*

C. *The failure to allege that petitioner acted wilfully.*

In the *Lamont* case, District Judge WEINFELD held (18 F. R. D. 27) that the indictments involved there were fatally defective for failure to allege that the refusals were "deliberate" or wilful. The decisions of this Court, upon which Judge WEINFELD relied, in *Quinn,* 349 U. S. 155, and in *Bart,* 349 U. S. 219, seem to us to dispose of this matter. In *Quinn* the Court held (at 165) that, "Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intention refusal to answer." The Court further ruled that, "This element of the offense, like any other, must be proved beyond a reasonable doubt."

If a deliberate, intentional refusal is an element of the offense which must be proven, it must also be alleged in the indictment. *United States* v. *Hess,* 124 U. S. 483. Nor can it be claimed that the requirement of wilfulness is a formal or technical one. Compare *Morisette* v. *United States,* 342 U. S. 246.**

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* This case is a perfect illustration of the injury that results to a defendant when he is compelled to guess at the question "then under inquiry." The trial court and the lower court did not agree as to the nature of the matter under inquiry. Petitioner had to grope in the dark in order to comprehend what was relevant or important in the government's testimony about his "subversive" background. He was denied a bill of particulars on a theory which the court disregarded in ruling on pertinency. He assumed that clause three of the Senate Resolution was invoked by the indictment from the way in which the case was tried and he has now learned that the subcommittee was proceeding under clauses one and two alone!

** The necessity for an allegation of a deliberate or intentional refusal is related to the requirement that the indictment set forth the

(Continued on following page)

All of our contentions regarding the defects in the indictment frame a conflict between two theories with respect to the contempt statute. We insist that this is, after all, an "ordinary federal criminal statute" which must be applied in the light of the well-understood canons of the criminal law. But the application of the statute in this case can only be defended on the theory, denounced long ago by Jefferson in a discussion of congressional contempt powers, that "the offense is to be undefined, and to be declared only *ex re nata,* according to the passions of the moment * * *." *

VI. The denial of petitioner's right to a fair and impartial grand jury.

In the trial court, petitioner unsuccessfully moved for a hearing in order to determine the qualifications of the grand jurors which returned the indictment. The motion represented that eleven members of the indicting grand jury were employees of the United States Government and two were housewives who might be wives of government employees. A hearing was sought to determine whether the votes of government employees or wives of government employees were necessary to return the indictment and to establish the bias of these individuals (R. 4-9). The motion was accompanied by an offer of proof of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to

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(Continued from preceding page)

nature of the matter under inquiry. As Judge BAZELON observed in his concurrence in *Bowers* v. *United States,* 202 F. 2d 447, 453 (App. D. C.),

> "A conclusive presumption of intent to violate the statute *might* attach to a naked refusal to answer * * * no such presumption would attach to a refusal to answer a question not shown to be 'pertinent to the question under inquiry.'"

* *Jefferson's Manual* (Sen. Ed. 1892) 194.

indict petitioner at the Government's request.* We think that a hearing should have been granted and that the Court should resolve this recurrent problem.

CONCLUSION

The decision of the court below conflicts with the applicable decisions of this Court and raises important questions of Federal law requiring review by this Court. The reasons stated above, as well as the Court's responsibility for the protection of the integrity of the grand jury system, require that this petition for writ of certiorari be granted, the decision below reversed and the indictment dismissed.

Respectfully submitted,

HUBERT T. DELANY,
52 Broadway,
New York, New York.

FRANK J. DONNER,
342 Madison Avenue,
New York, New York,

Attorneys for Petitioner.

Of Counsel:
TELFORD TAYLOR,
400 Madison Avenue,
New York, New York.

* Compare *Dennis* v. *United States*, 339 U. S. 162.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1958

Criminal 1216-55
FILED JAN 31 1958

No. 13,302

HARRY SACHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting in banc.

Judgment

Pursuant to the judgment of the Supreme Court of the United States dated July 23, 1957, this case came on to be reheard before the Court in banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court

appealed from in this case be, and it is hereby, affirmed.

Dated January 31, 1958.

Per Circuit Judge BURGER.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon join.

Separate dissenting opinion by Circuit Judge Washington.

Appendix B
Decision Below

(Opposite) ☛

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13302

HARRY SACHER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On reargument of appeal from the United States District Court for the District of Columbia pursuant to remand by the Supreme Court of the United States

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Decided January 31, 1958

Mr. Telford Taylor, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, *John D. Lane* and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, *Chief Judge*, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting en banc.

BURGER, *Circuit Judge:* Appellant Harry Sacher was convicted in the District Court under a three count indictment which charged him with violation of 2 U.S.C. § 192

for having refused to answer three questions[1] of a subcommittee of a Senate Committee which questions were found to be pertinent to a subject then under inquiry.[2] Appellant was sentenced to six months imprisonment and $1000 fine. Thereafter this court affirmed the District Court[3] and while a petition for certiorari was pending in the Supreme Court, the case of *Watkins* v. *United States*[4] was decided. Shortly thereafter, the Supreme Court granted certiorari and remanded the instant case[5] for reconsideration in light of *Watkins* v. *United States*. This court then set the appeal for reargument before the court en banc, received additional briefs and heard arguments.

On remand appellant raises four issues which he contends are controlled by the *Watkins* case: (1) the indict-

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[1] Count 1: "Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?"

Count 2: "Have you ever been a member of the Communist Party of the United States?"

Count 3: "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.?"

[2] The announced subject under inquiry was the Matusow recantation.

On several occasions after his defection from the Communist Party and prior to the time of Sacher's appearance, Harvey Matusow had appeared before the Internal Security Subcommittee and described Communist infiltration activities. Early in 1955 Matusow recanted his testimony and said he had "lied when he testified before the [Internal Security] subcommittee and on other occasions." Subsequently he executed adavits, one of which was used by Sacher in a motion for a new trial for the defendant Elizabeth Flynn, who was convicted under the Smith Act in a trial in which Matusow had been a witness against her.

[3] 99 U.S.App.D.C. 360, 240 F.2d 46 (1957).

[4] 354 U.S. 178.

[5] 354 U.S. 930.

ment failed to allege essential elements of the offense; (2) the inquiry infringed First Amendment rights of privacy; (3) the Senate Resolution 366, which established the subcommittee, is invalid; (4) it was not indisputably clear to appellant that the questions were pertinent to the subject matter of the inquiry.

I. *Sufficiency of Indictment.*

While conceding that the "*Watkins* case does not, of course, deal directly with the sufficiency of the indictment," appellant urges his indictment was constitutionally insufficient because it did not recite "the nature of the matter under inquiry and that the matter under inquiry was within the subcommittee's delegated authority." In our view nothing said or implied in the *Watkins* opinion suggests the Court intended to interpret Rule 7c, FED.R. CRIM.P., to require that an indictment under 2 U.S.C. § 192 recite details of the authority and scope of the inquiry. We see no reason to alter our earlier holding that the indictment is sufficient.[6]

II. *Infringement of First Amendment.*

Appellant urges that "even if pertinent," information as to membership in the Communist Party or the "Lawyers' Section" thereof, "was altogether too remote from the subject under inquiry [the Matusow recantation] to justify an invasion of his protected freedoms," under the First Amendment. The Supreme Court has indicated that where the exercise of the investigative powers of Congress comes into conflict with the rights to freedom of expression and (presumably) freedom of association, the need for clarity in the congressional Resolution becomes

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[6] This court previously considered the sufficiency of the indictment in connection with Sacher's now abandoned point that the indictment failed to recite his failure to answer was "willful." 99 U.S.App.D.C. 360, 367.

more acute. "The delegation of power to the committee must be clearly revealed in its charter." *United States* v. *Rumely*, 345 U.S. 41 (1953), cited in *Watkins*. The *Watkins* opinion also emphasizes that "not all such inquiries [which impinge on First Amendment freedoms] are barred" and that they are not invalid unless "unrelated to any legislative purpose." It is plain that the courts must find the presence of a valid purpose related to lawmaking to justify "compelled disclosure." Congress is not permitted to expose only to embarrass. We considered this contention carefully in our earlier opinion, saying, "It is difficult to imagine a clearer 'overriding public interest' than an inquiry into an alleged conspiracy to discredit the congressional and judicial processes by suborning witnesses and by procuring recantations of testimony upon which Congress and the courts have theretofore relied." 99 U.S.App.D.C. 360, 366. We hold that appellant's right to refuse to say whether he is a member of the Communist Party is not greater than the right of the Senate to inquire into the conspiracy just described and to know appellant's connection, if any, with Communist action groups provided the answer might shed light on the primary inquiry. Even if we were to assume that the right to engage in Communist Party activity is a right protected by the First Amendment, which of course we do not concede, that right, not being absolute, must yield to a superior public need, such as that presented here. Nothing in the *Watkins*[7] opinion suggests that our prior holding in this respect should not be adhered to.

III. *Validity of Senate Resolution 366.*

In a prosecution for contempt of Congress under 2 U.S.C. § 192, such as presented here, the resolution of

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[7] In the *Watkins* opinion the Court emphasized that the indictment questions related to *past* activities of *other* persons, not of the witness.

the parent body must show that there was a valid legislative purpose for the inquiry. Unless this is shown, the courts cannot determine whether the inquiry was pursuant to a valid legislative purpose and whether the inquiry was within the authority delegated by the parent body. The *Watkins* case dealt with a resolution criticized by the Supreme Court for its vagueness. We are dealing with a different resolution. Senate Resolution 366 so far as we rely on it provides as follows:

> "*Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States . . . ."

Bare recital of this portion of the resolution discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes "the kind of investigation that the committee was directed to make." When appellant was before the subcommittee the Internal Security Act of 1950 was recent legislation; in many respects it was novel, and its enforcement, and that of related laws was of acute interest and concern to the Congress, the Executive Branch and the public. The enforcement or lack of enforcement could be studied in various ways, including checking the truth or falsity of reports of conspiracies to frustrate the law and its enforcement by suborning witnesses. Such inquiries are important in amending and improving laws. We are satisfied that the resolution was valid, that investigation into the Matusow recantation was authorized by the resolution, and that the Matusow inquiry was pursuant to the valid legislative purpose plainly revealed by the resolution.

IV. *The Pertinency of the Questions.*

The final argument urged by Sacher is three-pronged. First, he contends that the questions were not even *intended* to be pertinent to the Matusow inquiry, but were intended to be pertinent to an altogether different subject,[8] and so he cannot be held to have known the questions were pertinent to the Matusow inquiry. Second he urges that the questions were not *in fact* pertinent to the Matusow inquiry, and so he cannot be held to have known that they were pertinent. Finally, he argues that even assuming the questions were intended to be pertinent to the Matusow inquiry, and further assuming the questions were in fact pertinent to the Matusow inquiry, still, he was not aware of these two factors at the time the questions were put to him; he correctly points out that under the *Watkins* case, to sustain a conviction it must appear that pertinency was made clear to the witness.

Intended Subject Matter: Appellant's contention is that the questions were not even intended to be pertinent to the Matusow inquiry, but instead, were intended to be pertinent to an inquiry relating, as he describes it, to "a measure . . . barring Communists from practice in the Federal courts." The determination of this issue is essentially one of fact the resolution of which depends entirely upon the record in the case.

As with almost any examination of a witness whether in court or before a committee, we find in this record a main thread of examination which is readily followed, and also occasional digressions. One digression was made from that main thread. In the original transcript this main thread, which is the Matusow inquiry, runs for 18 pages before the Count 1 question was asked. During the course of those 18 pages the witness resisted various

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[8] *Viz.* the admission of Communists to practice in Federal Courts, which subject, he argues, was beyond the scope of the subcommittee's powers.

questions, raised the issue of pertinency and after exchanges with the Chairman, gave answers covering in general his contacts with Matusow and with Communist leaders. Appellant contends the Count 1 question was asked in the context of this digression.

Shortly before the Count 1 question, a single question digressed into the subject of possible legislation controlling admission of Communist Party members to practice in Federal courts. However, the record conclusively shows that as a result of objections from appellant, the digression or "excursion" was promptly terminated and the line of questions brought back to "whether Matusow lied when he testified." The colloquy between the Chairman and appellant indisputably informed appellant that the digression was not approved by the Chairman and that he directed his counsel to ask the Count 1 question in order to "lay the foundation *for this,*" (emphasis added) *i.e.*, the inquiry into "whether Matusow lied."[9] In this context the Count 1 question was asked. Shortly following, the Count 2 question was asked.

The questions following those covered by Counts 1 and 2 related generally to contacts with Communist Party leaders, attendance at gatherings where Communist Party

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[9] Appellant objected to the digression saying he had understood he was called to testify about Matusow's recantation and argued that he had demonstrated in the Federal Court that Matusow lied. In the course of his statement he repeated three times that "Matusow lied" concluding:

> "Let there not be made here an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States *as to whether or not Matusow lied when he testified* at the Flynn trial. . . this is doing a disservice to the administration of justice.
>
> "Senator McClellan. *That* is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation *for this.*
>
> "Mr. Sourwine. Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?" (Emphasis added.)

members were present, including such gatherings which appellant explained as professional conferences or meetings with clients he was defending and inquiries specifically about being with named Communist Party members or leaders. As to most of these questions appellant said he could not recall. In this context he was asked the Count 3 question.

As to each of the indictment questions, as well as others, appellant protested against the alleged lack of pertinence or relevance of any inquiry about "political beliefs." He repeatedly and emphatically equated inquiries about Communist Party membership to "political" beliefs and professional associations.[10] As to the Count 3 question the Chairman explained:

> "This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party."

Thus the record shows, indisputably, that the Count 1 question was plainly related by the Chairman's statement to the announced subject matter, "whether Matusow lied" both in point of its timing and in relation to the colloquy which *immediately* preceded it. Similarly the succeeding questions were in that same context, and similarly after the brief "excursion." Consequently, we hold that the questions involved here were intended to elicit answers

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[10] We are unwilling to say that appellant's membership in the Communist Party, if he is a member, is "political" activity or a simple exercise of rights of association protected from Congressional inquiry in all circumstances. Indeed in the light of repeated pronouncements by all three branches of Government, we would not be free to do so even were we inclined, which we are not. Participation in the work of the Communist Party, U.S.A., is not a simple matter of flexing one's political ideas and beliefs.

which would throw light on the Matusow recantation inquiry; it was to the Matusow inquiry, and not to any other inquiry, that the questions were intended to be pertinent and to which they were in fact highly pertinent.

Pertinence in Fact: Appellant argues that Communist Party membership, even if shown, "could not conceivably have shed any light on the inquiry before the subcommittee." We do not concede this for a moment. It needs no discussion to see that it was pertinent to the Matusow inquiry to find out whether appellant had any connection with a Communist conspiracy to induce Matusow to recant.[11] Whether appellant was a Communist was logically one of a series of questions designed to disclose the nature of his connection, if any, with the conspiracy.

In a legislative inquiry we do not find the conventional pattern of direct examination followed by cross-examination. There are no pleadings which serve to narrow the inquiry toward proof of specific issues framed in advance. The prime purpose of questions must be to get information rather than prove previously asserted claims. The witness is given wide latitude in making a statement of his own framing. A necessary preliminary is to identify the witness, his residence, occupation, general background, etc., for the record so as to give meaning to his testimony for members of the full committee or the entire Congress, few of whom ever see the witnesses. Once the witness is so identified and qualified by these "background" questions, interrogation as to the main subject matter takes place, covering the central facts, events, etc. A third phase of questions may then become pertinent, which like the background questions are pertinent on their face. This third

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[11] We pointed out in our original opinion that when the subcommittee called Sacher it had (1) reports linking Sacher with the Communist Party, (2) reports linking the Communist Party with a conspiracy to bring about Matusow's recantation, (3) reports linking Sacher as one of the lawyers party to this conspiracy.

phase is the process of testing the reliability of the witness or his possible bias and prejudice.

The *Watkins* case dealt with questions falling in the second phase or the main subject matter. The indictment questions fall within the third phase having to do with "testing" of answers previously given. Certainly no one would seriously suggest that the subcommittee must explain why it wants a witness to identify himself with any more explicitness than that the questions are preliminary or for background. Questions concerning a possible bias or the reliability of a witness are also pertinent on their face and if any explanation is called for it need be in terms no more explicit than that they are to test bias or reliability, *i.e.*, are for cross-examination.

Appellant had announced his fixed position "that Matusow lied when he testified" in the Flynn case. In refusing to answer the Count 1 question he said that "an inquiry to me concerning this matter [Communist Party membership] is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me."

The Chairman was not bound to accept this statement, for he had already explained to appellant concerning his earlier objections: " . . . you are subject to cross-examination on" statements made to the committee.[12]

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[12] A key to appellant's state of mind with respect to pertinency is disclosed in his pre-*Watkins* brief (filed July 1956) in which he stated, "Once it had been established that appellant had no information to give the subcommittee on the question under inquiry before it, *i.e.*, the circumstances leading to Matusow's recantation, the appellant obviously should have been excused. In this context, the probing into appellant's *political beliefs and affiliations* had no conceivable relevance to the subject matter under inquiry.' (P. 23.)

At another point in appellant's pre-*Watkins* brief he said, "The scope of the investigation or the 'question under inquiry' was defined by the Chairman of the subcommittee, at

In his statement immediately before and immediately after the Count 1 question, appellant was referring to the Matusow inquiry. His objection took fundamental issue with the subcommittee's right to test his answers for possible bias by cross-examination as to connection with the alleged Communist conspiracy under study. Evaluation of appellant's entire testimony would be highly influenced by the fact that he was a Communist, if indeed he was, and the best evidence on this crucial matter was the first hand knowledge of the witness. If he was a member of a party or organization reported to have conspired to discredit disaffected former Communists who appeared as witnesses against the Communist Party, it would be vital for the Subcommittee to know that fact.

Nothing could be plainer than that one of the purposes of the indictment questions was to test the reliability of appellant's answers concerning his relationship to the Matusow recantation and his possible connection with a suspected conspiracy to discredit prosecution of Communist Party members. In view of this we have no doubt that the questions asked were *in fact* pertinent to the Matusow inquiry, and we so hold.

Appellant's Awareness of Intended Subject Matter and Pertinence: We reach last the heart of Sacher's case, which is the contention that even if the questions

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the opening of the investigation, as dealing with the truth or falsity of the testimony given by one Harvey Matusow.

. . . .

"* * * The questions put to the appellant which formed the subject matter of the indictment *must be tested for pertinency as against this* [*the Matusow*] *subject matter* as stated by the Chairman.

"Tested against this criterion the questions clearly were not pertinent since the answer to the questions could not conceivably have shed any light on the inquiry before the subcommittee . . . ." (Pp. 18, 19, 20; emphasis added in above excerpts.)

were asked with reference to the Matusow inquiry, he was not aware that they were pertinent to that inquiry. We have seen that the questions were intended to be pertinent to the Matusow inquiry, and were in fact pertinent thereto. But, under the *Watkins* case, it must also appear that Sacher was *aware* of these two elements at the time the questions were posed.

At the threshold we must resolve the question of how awareness is to be demonstrated. Must it be shown that the witness himself experienced cerebral processes which included consciousness of this element, *i.e.*, that he was indeed *actually* aware, or is it sufficient to show that a reasonable person in the same circumstances would have been so aware? The latter, of course, is the historic standard of proving criminal intent.

While not expressly so stating, we think the *Watkins* opinion contemplates that the demonstration of pertinency must be of such clarity that a reasonable person in the situation of the witness would have understood the connection between the question and the subject matter.[13] To interpret the *Watkins* opinion as establishing a purely subjective test would place the scope of legislative investigation largely, if not entirely, within the control of the witness. While a witness might, as we think this witness did, disclose his grasp of pertinency by his own responses, a witness who sat mute before a committee in the face of all explanations of "connective reasons" would place himself beyond the reach of compulsory process for all practical purposes. We do not think the *Watkins* opinion implied any such absurd result, sub silentio nullifying all power to compel testimony. Such a test would make a defendant in a contempt case the judge of his own guilt. Moreover it would remove control of legis-

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[13] *Cf.* 43 VA.L.REV. 803 (1957); 26 GEO.WASH.L.REV. 98 (1957).

lative investigations from the Congress and place control in the witnesses.

The test of pertinency rationally must, therefore, be an objective test in these terms: on the whole evidence can it be said, beyond reasonable doubt, that a reasonable man in the situation of the particular witness would have known the question asked was pertinent to the subject under inquiry? Pertinence in this sense means that the specific question posed contemplates an answer which will shed some light on the subject under inquiry.

With this test in mind, we turn to whether appellant knew or should have known that the subject matter to which the questions were intended to be pertinent was the Matusow inquiry, and that the questions were in fact pertinent to that inquiry and the manner in which they were pertinent.

The *Watkins* case application to this situation arises out of the following statement in that opinion:

> "*Unless* the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on the grounds of pertinency, to state for the record the subject under inquiry *at that time* and the *manner* in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." (Emphasis added.)

In other words, unless it is clear the witness knows, he is entitled to an explanation of what the subject matter is, and how the questions are pertinent.

We have already shown that the bar admission "excursion" was ended, and the thread of inquiry was back on the Matusow case, when the questions were posed. Appellant's first words after the Count 1 question were that he understood he was called to testify about the Matusow recantation and he was prepared to answer questions con-

cerning his participation in connection with that matter, but he simply was not going to discuss his "beliefs, religious, political, economic or social." Thus he demonstrated he knew the subject was the Matusow case, but claimed he did not think questions as to his possible Communist Party membership were pertinent to it. In so doing appellant showed he was taking the risks inherent in refusing to answer. Of course we are not foreclosed by appellant's statement that *he* could see no pertinency or relationship between Communist Party affiliation, if any, and the Matusow recantation. It is enough for our purpose that he *should* have seen the relationship and hence the pertinency.

In order to accept appellant's thesis, that he could not reasonably be held to be aware of pertinency, we must believe that an experienced lawyer could not understand that Communist Party membership would be important in judging the value of the testimony and the credibility of a witness called to testify about his part, if any, in an alleged Communist conspiracy to subvert justice.

In these circumstances we think the explanations, including the Chairman's statement, "You are subject to cross-examination . . . and that is what the committee is proceeding to do," would constitute a sufficient explanation even if addressed to a layman; addressed to a seasoned litigation lawyer of thirty years' experience, it was actually superfluous. Nevertheless it was given "for the record" and fully meets the criteria laid down by the *Watkins* case. If any witness could ever be in doubt about the pertinency of the instant questions to the inquiry into "whether Matusow lied when he testified" and whether there was a Communist conspiracy to discredit prosecution of Communist Party members, this appellant is not that man. By the very answers given and statements made in his testimony and which he formally argued in his briefs,

appellant demonstrated that no explanation could possibly have satisfied him or added to his knowledge.[14]

A witness may not frustrate the legitimate process of inquiry by shutting his mind to explanation any more than he could do so by stuffing his ears with cotton to prevent hearing the explanation. And where it is plain and clear that any reasonable man would grasp the pertinency of the question without explanation it would be sheer nonsense for courts to say that none the less someone must, as by playing a mechanically recorded message, parrot to the witness a recital of that which the evidence shows he knows.

We hold appellant's responses make manifest his *actual* awareness that the Matusow recantation was the subject matter to which the questions were related and that he was fully aware of the manner in which those specific questions were pertinent to that subject. Apart from appellant's actual state of mind, a witness so situ-

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[14] "I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the Fifth Amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is *not pertinent to anything* with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me." (Emphasis added.)

Also "I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question."

We note that Sacher appears not to have meant entirely what he said, for a few sentences later he abandoned this ground and revealed his "political" views to the extent: "I will say to the Chair that I have never been a member of any organization *which I believed* to be a teacher or advocate of the forceable or violent overthrow of the Government of the United States." (Emphasis added.)

ated reasonably should have known and could not fail to have known that the subcommittee asked these questions intending to secure information bearing on the Matusow inquiry and bearing on his own reliability as a witness, and such witness should have understood that the questions were therefore pertinent to that subject.

The dissenting opinion argues that "[t]he courts should be slow, however, to hold that a person shall be 'compelled' over his objection publicly 'to be a witness against himself' by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened . . . though he does not rest his objection on the Fifth."

The short and simple answer to this is that every witness who thinks any answer will or may incriminate him has an absolute protection in the Fifth Amendment. Unconsciously, perhaps, the dissent shrinks from "forcing" a witness to raise the Fifth Amendment because some people may draw dark inferences from its use. Over recent years the frequent employment of the Fifth Amendment has, in the minds of some, brought it into "disrepute." The Fifth Amendment plainly—and properly—was intended as a shield against self incrimination; the First Amendment was not. The use of the First Amendment to shield one from supplying "obviously incriminating information about himself" would be a perversion of the Constitution, needless so long as the Fifth Amendment stands. Should this perversion be sanctioned it would not be long before repeated use of the First as a haven from incrimination would "contaminate" that Amendment. Mere recital of these factors demonstrates the folly of trying to adjust constitutional interpretation to meet the shifting breezes of segments of public opinion and the prevailing modes of witnesses before legislative committees.

Appellant's conviction is

Affirmed.

FAHY, *Circuit Judge,* with whom EDGERTON, *Chief Judge,* and BAZELON, *Circuit Judge,* join, *dissenting:* The guidance now afforded by *Watkins* v. *United States,* 354 U.S. 178, was not available to the two-member subcommittee when it conducted the hearing out of which this case arose. In *Watkins* the Supreme Court held that upon objection by a witness because of the nonpertinency of a question the subject matter of the inquiry must appear "with indisputable clarity" else the investigative body must state for the record the subject then under inquiry and the manner in which the questions are pertinent thereto, with a description of the topic and the connective reasoning whereby the precise questions relate to it. *Watkins, supra* at 214-15. The subcommittee in the present case had authority to take sworn testimony only upon a subject which had been designated by the parent Subcommittee on Internal Security, namely, "Strategy and Tactics of World Communism: The Significance of the Matusow Case." Concededly it could not enlarge or change the subject of its inquiry.[1]

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[1] S. Res. 366, 81st Cong., 2d Sess., to which the Internal Security Subcommittee of the Senate Committee on the Judiciary owes its authority, provides,

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See also S. Res. 180, 81st Cong., 2d Sess., 96 Cong. Rec. 1284 (1950); S. Rep. 1208, 82d Cong., 1st Sess. (1950). On February 7, 1955, nine Senators were appointed to the Subcommittee. (G. Ex. No. 9.) On April 20, 1955, the Subcommittee authorized the taking of sworn testimony by one member. (G. Ex. No. 6.)

When appellant appeared on April 19, 1955, only two

Appellant, though at times protesting, answered all questions until asked by subcommittee counsel whether he had ever served a prison sentence. He expressed doubt as to the legislative purpose of this question. Thereupon the Chairman inquired of subcommittee counsel. He responded in the presence of the witness that legislation for the purpose of fixing additional standards for the practice of law in federal courts was under consideration and that it was germane to consideration of such legislation to inquire into circumstances involving the practice of law in federal courts by Communists or by those who defend Communists. He said he believed the inquiries in the Matusow case have bearing upon "that legislative problem now pending before the committee."[2] This was a clear departure from the subject about which the subcommittee was authorized to take testimony. The Chairman said he thought counsel "should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth."[3] The witness was then permitted to state his understanding that he was to be interrogated concerning the Matusow recantation, that this inquiry into his political beliefs and associations was diversionary, and that if the committee desired to know how judicial procedures

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members were present. Their authority under S. Res. 366 was limited to administering oaths and taking sworn testimony. They could not establish or change a subject under inquiry; that is "business" for the transaction of which there must be a majority of the Subcommittee present, as there was on February 21, 1955, when the subject under inquiry here involved was established. See *Hearings Before the Subcommittee on Internal Security of the Senate Committee of the Judiciary, "The Significance of the Matusow Case,"* 84th Cong., 1st Sess., pt. 1, at 1-3; pt. 10, at 827-40 (1955).

[2] *Hearings*, pt. 10, at 835 (1955).

[3] *Ibid.*

should be improved it should await Judge Dimock's judgment on what had transpired with respect to Matusow and the Flynn trial (in which appellant had been engaged), adding that this line of questioning was doing a disservice to the administration of justice. The Chairman then said, "That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this."[4]

The majority of the court, while characterizing "a single question" as having "digressed into the subject of possible legislation controlling admission of Communist Party members to practice in Federal courts,"[5] conclude that the main thread of inquiry persisted and that the Chairman, apparently by the statement last quoted, returned to the Matusow subject. Surely the witness would not have so understood with the indisputable clarity required by *Watkins*. On the contrary, it seems reasonably clear the Chairman at that point was not returning to the Matusow subject but was repeating in substance what he had said with regard to the digression from that subject, namely, "The Chair thinks you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth,"[6] the foundation referred to being with respect to the subject of practice in federal courts by Communists or those who defend them, not the Matusow case.

This view is consistent with the nature of the questions then asked the witness, a lawyer practicing in federal

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[4] *Id.* at 836.

[5] The Solicitor General, in his memorandum filed with the Supreme Court opposing certiorari, refers to the subject of practicing law as a "digression" from the Matusow matter. Brief in Opposition to Petition for Certiorari, pp. 14-16, Sacher v. United States, Supreme Court Docket No. 884, October 1956 Term.

[6] *Hearings*, pt. 10, p. 835.

courts: The first question was, "Are you, Mr. Sacher, a member of the Communist Party, USA?"[7] His refusal to answer this and the question which soon followed as to whether he had ever been a member of the Party, constitute the bases for the first and second counts of the indictment. The third count rests upon his refusal to answer the related question as to membership in the Lawyers' Section of the Communist Party, U.S.A., which he declined to answer on grounds previously stated as to the pertinency or relevancy of an inquiry concerning his political beliefs or affiliations. The Chairman answered this objection by pointing out to him the general duty, when it came to the security of our country, for the Congress to try to ferret out and expose these things as they relate directly to the national security, and "for that reason the Chair thinks that the question is proper and directs you to answer it."[8] This explanation bearing on pertinency did not have a tendency to advise the witness that the questions were pertinent, or that the subcommittee considered them pertinent, to the Matusow inquiry, the subject the subcommittee was authorized to pursue.

We do not examine the question of pertinency in the light of the full authority of the parent Internal Security Subcommittee itself under its own charter, S. Res. 366, n. 1 *supra;* for the prosecution before us requires pertinency to the single inquiry involving the Matusow case. As to this, it is no help to say that this court can itself now conclude from its own appraisal of the nature and implications of the Matusow case that the questions were pertinent to that subject of inquiry; for the witness at the time the questions were asked was "entitled to have knowledge of the subject to which the interrogation is

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[7] *Id.* at 836.

[8] *Id.* at 838.

deemed pertinent."[9] And the subject of the knowledge, of course, must be the authorized subject of inquiry.

Our approach to the case is with a consciousness that a First Amendment problem lies in the background, in which situation, as in *United States* v. *Rumely*, 345 U.S. 41, the courts will "construe narrowly the resolution describing the committee's authority."[10] Moreover, "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."[11] By the same reasoning pertinency of the questions to the revealed delegation of power must be clear to the witness when he is testifying. The required clarity is not supplied when pertinency is then explained to the witness in terms of a nondelegated subject of inquiry.

We have in mind also that our view of this case does not affect the authority of the Congress to obtain the information the subcommittee sought. It does not prevent Congress from ascertaining the facts from voluntary witnesses or other sources. The courts should be slow, however, to hold that a person shall be "compelled" over his objection publicly "to be a witness against himself" by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened,[12] though he does not rest his objection on the Fifth. In many instances reference to the Fifth is necessary to indicate that the answers might tend to

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[9] *Watkins* v. *United States*, 354 U.S. at 208-09, and see concurring opinion of Mr. Justice Frankfurter, 354 U.S. at 217.

[10] *Id.* at 198.

[11] *Ibid.*

[12] That First Amendment rights were threatened by the questions is clear, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250; *Koenigsberg* v. *State Bar*, 353 U.S. 252, 261; *Communications Ass'n* v. *Douds*, 339 U.S. 382, 393.

incriminate the witness. Individual values sought to be protected by the Bill of Rights should cause the courts not to coerce unnecessarily by the penalty of the criminal law answers which might publicly convict the witness of unfaithfulness to a standard of good citizenship held by all but a few of his fellow citizens. Unless some strong need requires that the information be obtained in this particular manner from the witness himself we think it should be secured by other means. Be that as it may, we think it follows from *Watkins* that unless such public self-condemnation is sought by the investigative body with respect to a legislative subject clearly within the scope of that body's authority, and unless this is made entirely clear to the witness, the witness may not be convicted of crime for refusing to respond. We cannot find on the record before the subcommittee that appellant should have known with the clarity required by *Watkins* that the questions were pertinent, and were asked as being pertinent, to the Matusow investigation. He could well have believed from their immediate context that they were asked as pertinent to the entirely different legislative purpose referred to by subcommittee counsel, namely, the practice in federal courts of Communists or persons defending Communists, a subject about which the two-member subcommittee conducting the hearing had not been authorized to take testimony.[13]

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[13] We have considered the views of the majority of this court that the questions were made pertinent by the Chairman's statement to the witness that he was "subject to cross-examination . . . and that is what the committee is proceeding to do." *Hearings*, pt. 10, p. 833. We do not give this statement the effect attributed to it by the majority; it preceded the digression with respect to practice in federal courts and did not prevent that digression from occurring. And as to Count 3, the Chairman's statement after the witness' refusal to answer, that the question was not related to the witness defending anyone in court but to his

WASHINGTON, *Circuit Judge, dissenting:* I think one of the main thrusts of *Watkins* was this: that the courts should not sanction the criminal conviction of a person who refuses to answer questions which touch upon First Amendment rights and which appear designed to produce "public self-condemnation," in Judge Fahy's phrase, unless there is shown clear legislative authority, within the framework of the constitutional responsibilities of the Congress. So viewed, I think this conviction cannot stand.

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being present or a member of a group of lawyers presumably dedicated to the Communist Party, does not suffice to eliminate the diversion when the course of the hearing is read and considered as a whole. When so read and considered, the Chairman's statement, while not implying criticism of the witness for defending a particular case in court, could reasonably have been thought by the witness to refer to the subject matter of the diversion rather than to the Matusow inquiry.

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No. 698

In the Supreme Court of the United States

October Term, 1957

HARRY SACHER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WILLIAM F. TOMPKINS,
Assistant Attorney General,

PHILIP R. MONAHAN,
DORIS H. SPANGENBURG,
Attorneys,
Department of Justice,
Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and two dissenting opinions in the Court of Appeals (Appendix B to the Petition, pp. 1-16, 17-22, 23), sitting *en banc*, which were rendered following this Court's remand of the case (354 U.S. 930) for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178, have not yet been reported. The original opinion of the three-judge division of the Court of Appeals is reported at 240 F. 2d 46.

The opinion of the District Court denying petitioner's motion to dismiss the indictment (R. 75-78) is reported at 139 F. Supp. 853. The opinion of the District Court (R. 64-74) rendered in conjunction with its verdict finding petitioner guilty as charged (a jury having been waived) is reported at 139 F. Supp. 855.

JURISDICTION

The judgment of the Court of Appeals (Pet. 47-48) was entered on January 31, 1958. The petition for a writ of certiorari was filed on March 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED [1]

1. Whether, in the circumstances presented by this record, and in the light of *Watkins* v. *United States*, 354 U.S. 178, the pertinence of the questions to the subject matter of the Senate Internal Security Subcommittee's inquiry was or should have been sufficiently clear to petitioner to sustain his conviction under 2 U.S.C. 192 for refusing to answer them.

2. Whether Senate Resolution 366, 81st Congress, which created the Internal Security Subcommittee and defined its powers, authorized it to require answers to these questions.

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[1] We omit from the "Questions Presented" issues which were urged in petitioner's prior petition for certiorari (No. 884, Oct. Term, 1956) and are repeated in the present petition, but with respect to which, because they are not affected by the *Watkins* decision, we rest on our replies set forth in our earlier brief in opposition. See *infra*, p. 27, including fn. 12.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d sess. (1950) (96 Cong. Rec. 16872) provides in pertinent part:

> *Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist

movement or any other movement seeking to overthrow the Government of the United States by force and violence.[2]

STATEMENT

On December 21, 1955, petitioner was charged in a three-count indictment (R. 2-3), returned in the United States District Court for the District of Columbia, with having refused, in violation of 2 U.S.C. 192 (*supra*, p. 3), to answer three questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, *viz.*, whether he then was or ever had been a member of the Communist Party (counts 1 and 2) and whether he then was or ever had been a member of the "Lawyers' Section" of that organization (count 3). Petitioner, having waived his right to a trial by jury (Tr. 3-4), was found guilty on all counts and was sentenced generally to six months' imprisonment and to pay a fine of $1,000 (R. 10).

On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on January 3, 1957, unanimously affirmed by a three-judge division of that court (240 F. 2d 46). Thereafter, this Court, on June 24, 1957 (354 U.S. 930), on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of

[2] The resolution was introduced in evidence as G. Ex. 1 (Tr. 17) and its full text is set forth in the printed Record at pages 80-82.

Appeals "for consideration in light of *Watkins* v. *United States*, 354 U.S. 178". The case was thereafter re-briefed and reargued in the Court of Appeals, which *sua sponte* determined to hear the case on remand *en banc*. On January 31, 1958, the Court of Appeals again affirmed the judgment of conviction (Appendix B to the Petition, pp. 1-16), four judges dissenting (*id.*, pp. 17-22, 23).

The pertinent facts may be summarized as follows:

On several occasions during the year 1952, Harvey Matusow appeared as a witness before the Internal Security Subcommittee of the Senate Committee on the Judiciary and gave sworn testimony concerning, among other subjects, the International Union of Mine, Mill and Smelter Workers (R. 100)—subsequently to be described by the Subcommittee as "Communist controlled" (G. Ex. 12, p. 79). In or about February 1955, Matusow publicly recanted this and other testimony given by him in other proceedings, saying that he had "lied when he testified before this subcommittee and on other occasions" (R. 100). On February 21, 1955 (R. 99), the Subcommittee commenced a series of hearings "to inquire into this whole matter" and to determine whether Matusow "told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth," or whether "part of what he told us was true and part was untrue," or whether "he never tells the truth by intent" (R. 100).

The Chairman of the Subcommittee, in opening the hearings, announced that the Subcommittee intended

to determine whether Matusow might have been influenced, in making his recantations, by considerations of "low personal greed", or whether he had been the "victim of pressure brought by Communists" and others having "a vested interest in concealing the Communist conspiracy" and had "finally broken under this pressure", or whether there might be some other explanation (R. 100).

Petitioner, one of the witnesses called in the inquiry, appeared before the Subcommittee, presided over by Senator McClellan, on April 19, 1955 (R. 11).

Information and reports in the possession of the committee when it called petitioner.—At the time of petitioner's appearance, the committee had in its files "evidence indicative of the fact that this whole matter"—*i.e.*, the Matusow recantations—was part of "a conspiracy having as its primary purpose the discrediting of Government witnesses [in prosecutions against members of the Communist Party]" and "the securing of new trials for convicted Communists" (R. 30-31). It was part of this plan, according to the committee's information, that an effort was to have been made to induce Matusow to execute affidavits recanting testimony previously given by him as a prosecution witness in the criminal trials of *Clinton Jencks* and *Elizabeth Gurley Flynn, et al.* (R. 29-30); that, "[a]s a device to get Mr. Matusow to do this," Matusow was "to write a book," the "money to pay for" which was to be "provided through the Mine, Mill and Smelter Workers Union" (R. 30); and that the book was to be published by Cameron

& Kahn, a publishing firm whose members were, according to the committee's information, both members of the Communist Party (R. 31-32, 36).

The committee's information further indicated that this plan had already been carried out to the extent that the book had been published (R. 30, 32), that it "contained chapters on the two trials" above referred to (R. 30), and that "[t]he affidavits [had been] prepared", and Matusow had been "induced to sign" them (*ibid.*). The committee further had information that Matusow's affidavit in the *Jencks* case "had been hatched by two attorneys", one of whom was Nathan Witt (*ibid.*); that petitioner "had received the [*Flynn* case] affidavit and certain other papers from Mr. Matusow" for use in applying for new trials for the defendants in that case, in which petitioner was of counsel (R. 31); and that the "entire Matusow proceeding, his recantation, the writing of the book, [and] the whole drive to discredit Government witnesses * * * were all the product of the planning of a group of lawyers within the Communist Party" (R. 33).

The committee had, in addition, "information respecting Mr. Sacher's connections with Communist and Communist front organizations going back * * * to at least as early as 1937" (R. 14).[4] Among other such associations, the committee had information that petitioner had, in 1950, been present at a "birthday

[4] Details of these Communist and Communist-front associations, all of which were in the committee's files, are set forth at R. 25-27 and in the Court of Appeals' former opinion (240 F.2d 46, 49-50).

party for Alexander Bittelman", held at the New York headquarters of the Communist Party and "attended only by high functionaries" of the Party (R. 25), and that he had, in 1947, attended a meeting in Boston at the home of Angus Cameron (of the publishing firm which later published Matusow's book), which meeting was also attended by "a known Communist section leader" (R. 36).

The committee further had reports that there existed a "lawyers commission or a law commission of the Communist Party", consisting of "a group of high functionaries of the party to whom had been delegated the formulation * * * of legal strategy for the party"; that "included in that group were Nathan Witt and Harry Sacher"; and that "probably one of those two was the head of it" (R. 36).

Finally, at the time of petitioner's appearance, the committee was satisfied that money had been received by Matusow "out of the treasury [of] the Mine, Mill and Smelter Workers * * * through Nathan Witt and Cameron and Kahn" (R. 34-35).

The reason that petitioner was summoned to testify, according to the committee's counsel, was in order to determine "to what extent he participated in the planning for the legal strategy of" the recantations (R. 35). Thus, as noted on the former opinion of the Court of Appeals (240 F. 2d 46, 50),

> * * * when the Subcommittee called appellant as a witness, it had information as to the following: (a) reports linking appellant with the Communist Party; (b) reports linking the Com-

munist Party with a conspiracy to bring about a recantation by Matusow of his testimony against the Communist Party and members thereof; and (c) reports linking appellant with this alleged conspiracy.

Petitioner's testimony at the committee hearing.—At the committee hearing, petitioner testified that he first met Matusow two days before the latter took the stand as a witness in support of a motion for a new trial in the *Flynn* case in the United States District Court for the Southern District of New York (R. 44); that he, petitioner, was one of the attorneys in the proceedings on the motion (*ibid.*); that, in connection with those proceedings, Matusow had given him numerous documents (R. 45, 48-49), including a copy of a 75-page report which he had some years previously given to the FBI and other agencies of the Government (R. 45), a diary recording events occurring over a period of several years in the recent past (R. 48), and papers used in the preparation of testimony given by him in a number of cases before the Subversive Activities Control Board (R. 49). During the course of the questioning, petitioner was informed that the "primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow, whom this committee is investigating * * *" (R. 46).

Petitioner denied having received from Matusow the affidavit of recantation used in the *Flynn* case (R. 49), denied having had anything to do with the preparation of the affidavit (R. 50), and denied ever having discussed it with Witt prior to its execution (R. 49-50), but admitted that he may have discussed

it with Witt following its execution, during the course of the *Flynn* proceedings, inasmuch as Witt, as counsel for Jencks, was interested in those proceedings (R. 50).

At this point in the proceedings, committee counsel asked petitioner whether he had "ever served a prison sentence" (R. 50). Petitioner asked the committee chairman, Senator McClellan, what the purpose of this question was (*ibid.*). In reply to the chairman's query as to the purpose of the question, counsel stated that "among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal Courts", including legislation "which would prohibit members of the Communist Party from practicing law in Federal Courts", and that it was "germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists" (R. 50-51). Counsel further stated that he believed that "the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee" (R. 51). The chairman told counsel he "should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51).

Petitioner at this point asked and received leave to be heard (R. 51). He made a brief statement to the committee, in the course of which he stated that "my understanding, when I came here was, as given

to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation" and protested that an inquiry into his "political beliefs or associations" seemed to him to be "diversionary in character" (R. 51). He concluded his objection by stating (R. 51-52):

> Let there not be made here an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

The Chairman, immediately following the foregoing remarks of petitioner, replied (R. 52):

> That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Petitioner was then asked whether he was a member of the Communist Party (R. 52-53)—this being the question on which count 1 of the indictment is based (*supra*, p. 4). He refused to answer, asserting that "it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views" and that "an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me" (R. 52). He specifically disclaimed reliance on the Fifth Amendment (R. 52). The Chairman overruled petitioner's objections and di-

rected him to answer, but he still refused (R. 53). The Chairman then asked petitioner whether he had "ever been" a member of the Party (the question underlying count 2; *supra*, p. 4). Petitioner refused, on substantially the same grounds, to answer that question also (R. 53).

Petitioner then stated, in reply to another question from the Chairman, that he had never been a member of any organization which he believed to have taught or advocated the forcible overthrow of the United States Government. He was then again asked by the committee counsel whether he had "ever served a prison sentence" (R. 53). On this occasion petitioner answered the question, replying that he had served a prison sentence—for contempt of court (R. 53).

Questions were then asked about meetings petitioner had had with leaders of the Communist Party (R. 54). He replied that, apart from meetings which he had had with Party leaders who were clients of his, and which he had attended in his professional capacity, he could not recall attending any such meetings (R. 54). He said he had "no recollection" of having attended a 1950 birthday party for Alexander Bittelman, held in the New York headquarters of the Communist Party (R. 54-55)—this being one of the Party gatherings at which petitioner, according to information in the Committee's files, had been present (*supra*, pp. 7-8). He was then asked whether he had "any connection with the legal commission or law commission of the Communist Party" (R. 55). When he replied that he did not "know of any such organization", he was asked whether he then was or ever

had been "a member of the Lawyers' Section of the Communist Party" (R. 55). This is the question on which count 3 of the indictment is based. (*supra*, p. 4). Petitioner replied (R. 55):

> Mr. Chairman, I have declined before and I decline again * * * [o]n the grounds that I have already stated * * *, and I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

There followed a colloquy between petitioner and the committee chairman (R. 55-57) in the course of which petitioner made it emphatically clear that he would, under no circumstances or conditions, answer the pending question or any other question calculated to inquire into his "innermost thoughts and beliefs, whether they be on politics, religion or anything else" "on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs" (R. 56; see also R. 57). On being ordered by the chairman to answer the question notwithstanding his objections, petitioner refused (R. 57).[4]

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[4] Immediately following this refusal, petitioner was asked whether he had ever attended a "Communist meeting at the home of Angus Cameron" (R. 57). As previously noted, Cameron was one of the two members of the firm of Cameron & Kahn, which, in or about 1955, published Matusow's book accusing himself of past perjuries, and the Committee had information (1) that both Cameron and Kahn were

ARGUMENT

I.

Petitioner's principal contention (Pet. 25-36), for which he relies on the *Watkins* decision, 354 U.S. 178 (Pet. 25), is that "the pertinency of the questions to the matter under inquiry was not communicated to him with the explicitness and clarity required by the due process clause" (Pet. 25).

Here, unlike *Watkins*, the precise "matter under inquiry"—Matusow's recantation and what if anything petitioner had to do with it—is not in dispute (Pet. 27; R. 51). As petitioner conceded in his prior petition for certiorari (No. 884, Oct. Term, 1956, p. 31), this subject "was clearly defined by the subcommittee and petitioner was specifically notified as to what that subject was at the time he was subpoenaed." The burden of petitioner's argument is that the committee, midway during his appearance, abandoned that subject and took up another entirely different one, *i.e.*, the proposed legislation which the committee had under consideration which would have barred lawyer members of the Communist Party from practicing in the federal courts (Pet. 28; R.

Communist Party members, and (2) that petitioner was present at a Party meeting in Cameron's home in 1947 (see *supra*, pp. 6-7, 8). Petitioner, after first stating that he had "no recollection" of ever having been at Cameron's home (R. 57), admitted, upon further questioning, that he had been in Cameron's home "once, * * * in Boston" (R. 58). He insisted, however, that he did not know "what meeting took place there [on this occasion], whether it was Communist or not" (R. 58).

50); that the questions which petitioner refused to answer (see *supra*, p. 4) were asked during the committee's consideration of this new subject; that they were pertinent to it alone, if pertinent at all; and that the committee itself related the questions (so far as pertinency is concerned) to the new subject. At least, it is argued, if the Matusow inquiry was not abandoned, and if the questions in issue were in fact asked in connection with that inquiry, the "connective reasoning" (*Watkins*, 354 U.S. at 215) linking the questions with that inquiry was not brought home to petitioner with the degree of definiteness and clarity required under the due process clause for a criminal conviction for refusal to answer.

We submit, on the other hand, that the Matusow inquiry was never abandoned by the committee; that the "brief excursion" [5] into proposed legislation barring Communists from federal practice was not inconsistent with the committee's continued consideration of the Matusow matter, and did not terminate or substantially interrupt that inquiry; that, even if this brief "excursion" be considered a digression, the digression was terminated and the Matusow inquiry resumed before the asking of the questions here involved, and certainly before the asking of the third question, underlying the third count of the indictment; that all three questions were in fact highly pertinent to the Matusow inquiry; and that peti-

[5] The expression is that of the court below in its former opinion (240 F. 2d 46, 53). See, also, the lower court's opinion rendered following the remand (Pet. App. 7).

tioner knew or reasonably should have known that they were so.[6]

(1). Petitioner insists that "the record objectively shows a *complete abandonment* of the Matusow subject" (Pet. 31, emphasis added) when the committee counsel, in reply to the chairman's query as to the purpose of counsel's question as to whether petitioner had ever served a prison sentence, referred the chairman to the proposed legislation under consideration by the committee prohibiting Communist Party members from practicing law in the Federal courts (R. 50), and the chairman directed counsel to "lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51). However, the court below rightly held that "There was no abandonment of the 'Matusow Case' inquiry by reason of the brief excursion into discussion of possible legislation relating to law practice" (see the former opinion, 240 F. 2d at 53). There was no incompatibility between

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[6] Petitioner, referring to Senate Resolution 366 (*supra*, pp. 3-4), creating the Internal Security Subcommittee, argues (Pet. 25-27) that "a claim that the resolution clarified the pertinency of the questions would be absurd" (Pet. 27). Of course, we make no such claim. The resolution, defining the general boundaries of the Subcommittee's jurisdiction, authorized and empowered the committee to undertake the inquiry in which it was engaged when Matusow originally testified before it (see *supra*, p. 5), as well as the inquiry into the circumstances surrounding Matusow's later recantation of that testimony, but the pertinency of the questions which petitioner refused to answer during the course of the latter inquiry is to be determined, as it is proper to do (*Watkins* v. *United States*, 354 U.S. 178), from the entire complex of circumstances attending their asking.

the subject of the Matusow inquiry and the proposed legislation. Rather, the two subjects were interrelated.

The committee counsel, in referring the chairman to the proposed legislation, said (R. 50-51):

> * * * It is germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists and by persons who are defending Communists. *I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.* [Emphasis added]

It is thus certainly clear that the committee counsel did not consider the subject of the proposed legislation to be alien to the Matusow inquiry. Nor, we submit, did the chairman, if his remarks about "lay[ing] a foundation" are considered in the context in which he uttered them, *i.e.*, immediately following the above-quoted observations of counsel.

In short, the brief colloquy concerning proposed legislation relating to practice in the Federal courts, taken in its context, shows, not an abandonment of the Matusow inquiry, but rather a logical connection between the Matusow recantation and the proposed legislation. The Matusow recantation, as we have pointed out (*supra*, pp. 5-10), involved important federal proceedings both in Congress and in the courts, and the committee had information tending to show that it was part of a Communist conspiracy "having as its primary purpose the discrediting of Government

witnesses" and "the securing of new trials for convicted Communists" (R. 30-31). So viewed, there was nothing essentially digressionary in the brief discussion about proposed legislation prohibiting the practice of law by Communists in the Federal courts.[7]

(2). But even if it be assumed for argument purposes that the discussion about proposed legislation relating to law practice constituted a temporary departure from the main theme of the hearing, *i.e.*, petitioner's connection (if any) with the Matusow recantation, the majority below were correct in holding that "the digression or 'excursion' was promptly terminated and the line of questions brought back"—before the asking of the questions here in issue—"to 'whether Matusow lied when he testified' " (Pet. App. 7).

As noted in the opinion below, petitioner, in the course of his statement objecting to what he conceived to be a subject alien to the inquiry into the circumstances of the Matusow recantation (see R. 51-52), "repeated three times that 'Matusow lied' " (Pet. App. 7, fn. 9), and concluded his remarks as follows (*ibid.*; R. 51-52):

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[7] Two months after petitioner's appearance before the Subcommittee, the chairman of the Subcommittee in fact introduced a bill in Congress requiring attorneys practicing in the Federal courts or before executive agencies of the Federal Government, or representing witnesses appearing before congressional committees, to file non-Communist affidavits (S. 2326, 84th Cong., 1st sess. [G. Ex. 10, R. 86]). See also the report of the Subcommittee on the "Significance of the Matusow Case", which included an account of petitioner's refusal to answer questions and a recommendation that the above legislation be enacted (G. Ex. 12, R. 87, 94-98).

> * * * Let there not be made here an attempt to prejudice the determination not only by Judge Dimock [the presiding judge at the *Flynn* trial (see *supra*, pp. 6-10)], but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

At this point, as the court notes (Pet. App. 7, fn. 9), the committee chairman said (R. 52):

> That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

The count-1 question—whether petitioner was a member of the Communist Party—was then asked (R. 52), and the count-2 question—whether he had ever been a member of the Party—was asked shortly thereafter (R. 53).

We submit that the Court of Appeals is clearly correct in interpreting the chairman's statement, "That is what we are trying to find out," as referring to petitioner's thrice-repeated charge that "Matusow lied." So viewed, the chairman's statement, as a whole, is reasonably read as terminating the "excursion" into the subject of proposed legislation and getting the inquiry back on to the track of the "Matusow recantation"—assuming that it had ever left it in any substantial sense.

(3). In any event, we submit that the count-3 question—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party" (*supra*, p. 4; R. 55)—is invulnerable to any of petitioner's criticisms based on the alleged "di-

version" or "excursion." If so, since petitioner's general sentence (see *supra*, p. 4) is sustainable under that count alone, it is unnecessary to consider whether the other counts are valid. *Claassen* v. *United States*, 142 U.S. 140, 146-147; *United States* v. *Trenton Potteries*, 273 U.S. 392, 401-402; cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

When the question and refusal on which count 3 is based took place, the discussion of the proposed legislation relating to law practice had clearly ended and the inquiry into the subject of the Matusow recantation clearly resumed (if it had ever been departed from). For the count-3 question was not asked until some time after petitioner was asked for the second time—and this time he answered (in the affirmative) —the question of whether he had "ever served a prison sentence" (*supra*, pp. 12-13; R. 53, 55). Since the record is clear that it was this question (when first asked) which precipitated the "excursion" into the subject of proposed legislation relating to law practice (see *supra*, p. 10), the committee's "digression" into the latter subject (if there was one) must certainly be considered to have come to an end, at the latest, when petitioner was again asked (and this time answered) whether he had ever served such a sentence.

Significantly, both the questions immediately preceding and those immediately following the count-3 question probed into matters in which the committee was especially interested in connection with its inquiry into the Matusow recantation and the part, if any, which petitioner played in a "Communist con-

spiracy" to bring about that recantation. The questions immediately before the count-3 question had to do with whether petitioner attended the 1950 birthday party for AlexanderBittelman (R. 54-55; see *supra*, pp. 12-13); the committee, as we have seen, had information to the effect that petitioner did attend this party (*supra*, pp. 7-8), and this information, deemed by the committee to be pertinent to the Matusow inquiry, constituted one of the reasons "which caused it to call Mr. Sacher" (R. 25). The questions immediately after the count-3 question related to whether petitioner attended a 1947 Party meeting in the home of Angus Cameron, of the publishing firm which issued Matusow's book (R. 57-58; see *supra*, pp. 13-14, fn. 4); the committee, as has also been pointed out, likewise had information to the effect that petitioner did attend such a meeting (*supra*, p. 8) and such information had a manifest relevance to the Matusow inquiry.[8]

Thus, the context in which the count-3 question was asked—in the midst of other questions having clear pertinence to the Matusow inquiry—is clear proof that the committee had already returned to that inquiry (if it ever left it). And since the count-3 question—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party"—was clearly germane to the committee's inquiry into whether he was party to a "Communist conspiracy" to procure a false recantation by Matu-

[8] This constituted another of the reasons why the committee summoned petitioner to testify in its Matusow inquiry (R. 36).

sow with the objective of casting discredit on anti-Party witnesses in general (see sub-point (4), immediately following), it follows that the third count is certainly not subject to the invalidity allegedly infecting the other two counts.

(4). That the questions underlying all three counts were pertinent *in fact* to the Matusow inquiry is clear. As noted by the court below, "It needs no discussion to see that [the question of whether or not the petitioner was a member of the Communist Party] was pertinent to the Matusow inquiry to find out whether [petitioner] had any connection with a Communist conspiracy to induce Matusow to recant" (Pet. App. 9). "[W]hen the subcommittee called Sacher it had (1) reports linking Sacher with the Communist Party, (2) reports linking the Communist Party with a conspiracy to bring about Matusow's recantation, [and] (3) reports linking Sacher as one of the lawyers party to this conspiracy" (*id.*, fn. 11). Hence, "[w]hether [petitioner] was a Communist was logically one of a series of questions designed to disclose the nature of his connection, if any, with the conspiracy" (Pet. App. 9).

(5). Finally, it is submitted that petitioner knew or reasonably should have known that the questions were pertinent to the Matusow inquiry. It is unnecessary to elaborate on the thorough treatment of this point in the majority opinion below (Pet. App. 11-16). It is sufficient to emphasize that, as the court points out (*id.* 13-14), petitioner's "first words after the Count 1 question [see R. 52], were that he understood he was called to testify about the Matusow recantation and he was prepared to answer ques-

tions concerning his participation in connection with that matter, but he simply was not going to discuss his 'beliefs, religious, political, economic or social.'" "Thus," as the court continues (Pet. App. 14),

> he demonstrated he knew the subject was the Matusow case, but claimed he did not think questions as to his possible Communist Party membership were pertinent to it. In so doing appellant showed he was taking the risks inherent in refusing to answer. Of course we are not foreclosed by appellant's statement that *he* could see no pertinency or relationship between Communist Party affiliation, if any, and the Matusow recantation. It is enough for our purpose that he *should* have seen the relationship and hence the pertinency. [Emphasis in the original][9]

Furthermore, it is clear from the record that, even if the pertinency of the questions had been obscure, petitioner himself precluded a fuller and more detailed explanation of the way in which they were pertinent. For petitioner made it emphatically plain that his refusals to answer questions relating to Communist affiliations were absolute and unconditional. He refused "categorically", he told the chairman, to discuss his "political" beliefs (which he equated to answering questions pertaining to his Communist affiliations) because to do so was "inconsistent with the dignity of any man" (R. 52).

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[9] Compare *Sinclair* v. *United States*, 279 U.S. 263, 299: "The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense."

There was, he said, "*nothing* in the purposes of the committee *or the Congress* which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations" (R. 55, emphasis added). These and other remarks of petitioner at the hearing (see R. 51-53, 55-57) show that he was *not* basing his refusals to answer on any departure by the committee from the main subject of the inquiry. He did not, in other words, tie his refusals to the committee's "brief excursion." His refusals were unqualified and unconditional.

Petitioner's present arguments with respect to pertinency are afterthoughts, which have no apparent relation to his conduct at the hearing. And it is hardly conceivable that, had he signified to the committee that one of the reasons for declining to answer questions having to do with Communist affiliations was his belief that they purported to relate to a matter other than the Matusow inquiry, the chairman would not have promptly and specifically related the questions to that inquiry. Petitioner, of course, did nothing of the sort. His present efforts to overturn his conviction on the basis of objections which could have been met if they had been raised at the proper time should therefore fail.[10]

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[10] The dissent of Judge Fahy, with whom Judges Edgerton and Bazelon joined, is predicated, in part at least, on the view that "[t]he courts should be slow * * * to hold that a person shall be 'compelled' over his objection publicly 'to be a witness against himself' by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened [footnote reference omitted], though he does not rest his objection on the Fifth" (Pet. App. 21, emphasis in the original). There is,

II.

Petitioner next argues (Pet. 36-37) that Senate Resolution 366 (*supra*, pp. 3-4), which created the Internal Security Subcommittee and defined its powers, did not authorize the Subcommittee to "require answers to questions such as those put to petitioner" (Pet. 36). But if those questions were clearly pertinent—as they were (see *supra*, p. 22)—to an inquiry in which the Subcommittee was legitimately engaged, the Subcommittee obviously had authority to ask them.

Nor can there be any doubt that the Subcommittee's inquiry into the Matusow matter was a legitimate one. Matusow had in the recent past appeared before the Subcommittee and given extensive testimony in the committee's field of interest (see *supra*, p. 5; R. 100). He had now repudiated that testimony and declared it perjured. It was a matter of legitimate concern to the committee to inquire into the circumstances attending this recantation.[11]

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however, we think, as observed by the majority (*id.* at 16), no warrant for this confusion of the protections afforded by these respective Amendments. As the majority point out, "The use of the First Amendment to shield one from supplying 'obviously incriminating information about himself' would be a perversion of the Constitution, needless so long as the Fifth Amendment stands. Should this perversion be sanctioned it would not be long before repeated use of the First as a haven from incrimination would 'contaminate' that Amendment [in the same manner that the Fifth Amendment has, in the minds of some, been brought into "disrepute"]".

[11] For this reason, there is no merit to petitioner's contention—which he is now advancing for the first time, so

If petitioner's point be that the Subcommittee had no authority to inquire into the subject into which it was probing when Matusow first appeared and gave his subsequently repudiated testimony—the Communist Party's influence in and penetration of the labor movement and other fields (see *supra*, p. 5), and R. 100)—the argument is clearly without merit. The Subcommittee's authorizing resolution (Senate Resolution 366) empowered it to make a "complete and continuing study and investigation" of, *inter alia*, "the extent, nature, and effects of subversive activities in the United States * * *, including * * * infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement * * *." This was a mandate from the Senate to investigate Communism's impact upon the various phases of the national economy and the "infiltration" by members of the Communist Party into other groups and organizations. There is nothing in the *Watkins* decision, involving the less specific authorizing resolution of the House Un-American Activities

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far as we have been able to determine, in this second petition for certiorari—that "[t]he subcommittee was not authorized by the full committee to conduct the [Matusow] inquiry" (Pet. 39). The Subcommittee's authority to conduct the Matusow inquiry derived from its basic enabling resolution, *i.e.*, Senate Resolution 366, 81st Congress (*supra*, pp. 3-4), and the parent Judiciary Committee's resolution of January 20, 1955, "continu[ing]" the Subcommittee "during the 84th Congress" (G. Ex. 2, R. 82-83). A subcommittee does not need a new authorization for each particular inquiry it conducts. It is sufficient if the inquiry comes within the scope of its general powers.

Committee, indicating that the Senate Internal Security Subcommittee lacks authority under its empowering resolution to inquire into the scope and impact of Communism on American life and institutions.

Furthermore, when Matusow originally appeared before the Subcommittee, he appeared as a willing, "friendly" witness. The crux of *Watkins*' criticism, on grounds of vagueness, of the House Committee's enabling resolution was with respect to its authorization for compelling unwilling testimony.

III.

Petitioner's remaining contentions are in substance repetitions of points made in his earlier petition for certiorari. Since none is affected by the *Watkins* decision, we rest on our replies to these points in our earlier brief in opposition.[12]

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[12] On the constitutionality of Senate Resolution 366, if construed as authorizing the asking of the questions here in issue (Pet. 37-39), see our brief in opposition (No. 884, Oct. Term, 1956), pp. 19-20; see also, on this issue, the majority opinion below at Pet. App. 3-4. On the question of petitioner's several challenges to the sufficiency of the indictment (Pet. 39-44), see brief in opposition, pp. 18-19. And on the question of the alleged denial of his right to a "fair and impartial grand jury" (Pet. 44-45), see brief in opposition, pp. 22-23, fn. 9.

In our earlier brief in opposition, it was inadvertently stated that the grand jury point was not raised in the Court of Appeals (p. 22). As pointed out in his reply to our opposition (at pp. 11-12), petitioner, in a footnote reference in his Court of Appeals brief, "sav[ed]" the point without briefing it.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

PHILIP R. MONAHAN,
DORIS H. SPANGENBURG,
Attorneys.

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